Supreme Court, U.S.
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No.00-

IN THE

Supreme Court of the United States

October Term, 2000

ESTON BULLARD, JR.,

Petitioner,

vs.

MICHAEL W. MOORE,
D.O.C. Secretary;

ROBERT A. BUTTERWORTH,
The Attorney General of the State of Florida,

Respondent(s)

PETITION FOR WRIT OF HABEAS CORPUS

EASTON BULLARD 008037
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113 pp

SUMMARY OF THE ISSUES PRESENTED

I.

Petitioner was denied his Sixth Amendment right to effective assistance of counsel pursuant to this Court's decision in *Strickland v. Washington*, 104 S.Ct. 2052 (1984), wherein defense counsel failed to object to an erroneous jury instruction that added an improper element - "temporary deprivation" - to the crime of robbery, thereby reducing the State's burden of proof and depriving Petitioner of his Due Process right to a fair trial.

The lower court denied relief on this issue by misapplying this Court's decision in *Lockhart v. Fretwell*, 506 U.S. 364 (1993), holding that if Petitioner were retried the erroneous jury instruction would be repeated because the State Supreme Court had, some years after Petitioner's alleged offense was committed, added "temporary deprivation" to the elements of robbery. Not only is this a misapplication of *Fretwell*, it is also directly in conflict with this Court's decisions in *Wainwright v. Stone*, 94 S.Ct. 190 (1973); *Calder v. Bull*, 3 U.S. 836 (1798); *Bouie v. City of Columbia*, 378 U.S. 347 (1964); *Marks v. United States*, 430 U.S. 188 (177); among others.

II

The trial court's use of an erroneous jury instruction that added an improper element to the crime of robbery, thereby lessening the State's burden of proof,

violated the Due Process Clause of the Fourteenth Amendment.

The lower court denied relief on this issue by holding that defense counsel's failure to object to the erroneous instruction was "sound trial strategy." That decision is in conflict with this Court's decision in *Estelle v. McQuire*, 502 U.S. 62 (1991); and *Matthews v. United States*, 485 U.S. 58 (1988).

III

Petitioner was denied his Sixth Amendment right to effective assistance of counsel, *Strickland v. Washington*, supra, by Appellate Counsel's failure to raise on direct appeal the state trial court's denial of Petitioner's Motion for Severance for the murder and robbery charge. The issue was meritorious and there was no strategic reason for not raising the issue.

IV

Petitioner was deprived of his Due Process and Liberty Interest rights when the state trial court disregarded controlling Florida Supreme Court case law and the mandate and law of the case established by the State Appellate Court, (and) resentenced Petitioner again to a life sentence instead of the limited seven (7) to nine (9) year sentence prescribed by the applicable state sentencing guidelines.

V

Petitioner's life sentence imposed on resentencing violated the Ex Post Facto and Due process Clauses of the Fifth and Fourteenth Amendments, wherein the state trial court relied on an aggravating factor that was not approved by the State Supreme Court until after the alleged offense was committed.

PARTIES

The Petitioner is Eston Bullard, Jr., a prisoner in the Florida Department of Corrections prison system.

The Respondents are Michael W. Moore, Secretary of the Florida Department of Corrections, and Robert A. Butterworth, Attorney General of the State of Florida.

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PROCEEDINGS AND DISPOSITIONS BELOW

On March 14, 1986, the Circuit Court, Fourth Judicial Circuit for Duval County, Florida, after a jury verdict, adjudicated Petitioner guilty of armed robbery and on July 8 sentenced Appellant to life in prison. The Petitioner was found not guilty of First Degree Murder.

The Florida District Court of Appeal, First District, affirmed Petitioner's judgment but remanded his case for resentencing. *Bullard v. State*, 515 So.2d 1028 (Fla. Dist. Ct. App. 1987) *cert. denied*, *Bullard v. State*, 529 So.2d 693 (Fla.1988).

The Petitioner was resentenced to life on March 3, 1989 by the trial court and timely filed an appeal. The Florida District Court of Appeal, First District affirmed the Petitioner's life sentence by its *per curiam* opinion dated April 12, 1990. *Bullard v. State*, 559 So.2d 1140 (Fla. Dist. Ct. App. 1990).

Petitioner also filed a Petition for Writ of Habeas Corpus seeking a belated appeal in the Florida District Court of Appeal, First District which was denied by an unreported *per curiam* opinion issued October 17, 1989.

The Petitioner then filed a Motion for Postconviction relief in the State trial court which was denied by its order dated August 2, 1990. The Petitioner filed a direct appeal of that order which was denied by Florida District Court of Appeal, First District by its *per curiam* opinion dated March 5, 1991. *Bullard v.*

State, 575 So.2d 656 (Fla. Dist. Ct. App. 1991).

The Petitioner next filed a Petition for Writ of habeas Corpus in the Florida Supreme Court which was denied by *per curiam* opinion dated May 29, 1981. *Bullard v. State*, 575 So.2d 656 (Fla.1991). Petitioner then sought relief in the trial court via a petition for Writ of habeas Corpus which was denied by the trial court's order dated September 12, 1991. The Petitioner appealed that order to Florida District Court of Appeal, First district. The appellate court affirmed the trial court's order denying habeas relief by its *per curiam* opinion. See *Bullard v. State*, 603 So.2d 1278 (Fla. Dist. Ct. App. 1992).

The Petitioner again sought relief in the trial court by filing a second Motion for Postconviction Relief which the trial court denied by its order dated November 12, 1991. Once again the Petitioner filed a direct appeal of that order to the Florida District Court of Appeal, First District. The appellate court affirmed the trial court's order by its *per curiam* opinion issued June 3, 1992. *Bullard v. State*, 600 So.2d 1105 (Fla. Dist. Ct. App. 1992).

The Petitioner then filed a Habeas Corpus Petition in the Florida District Court of Appeal, First District in case number 92-3073 which was denied by an unreported court order entered September 30, 1992.

The Petitioner again returned to the Florida Supreme Court by filing a petition

for Writ of habeas Corpus which was denied by its *per curiam* opinion dated February 16, 1993. *Bullard v. State*, 613 So.2d 1 (Fla.1993). Last, Petitioner sought relief in the Florida Supreme Court by filing a Petition for Writ of Habeas Corpus which the court denied by its *per curiam* opinion dated December 8, 1993. *Bullard v. State*, 626 So.2d 1367 (Fla.1993).

Petitioner filed a petition for writ of habeas corpus pursuant to 28 U.S.C. §2254. An evidentiary hearing was held on February 13, 1997, and on June 5, 1997 the Magistrate issued a Report and Recommendation recommending the petition be denied. (R2-43).[1]

Petitioner timely filed objections to the Report and Recommendation.

On October 14, 1997 the District Court judge adopted the Report and Recommendation in its entirety and denied the petition for writ of habeas corpus.

On November 4, 1997 Petitioner filed a notice of appeal. (R2-53). Appellant's motion for certificate of probable cause to appeal was filed with the District Court on November 26, 1997. The State did not appeal or cross-appeal.

On December 12, 1997 the District Court summarily granted Petitioner's motion for a certificate of probable cause

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[1]. Petitioner will cite the record as submitted to the Eleventh Circuit Court of Appeals.

to appeal. (R2-55). Petitioner is presently incarcerated at Union Correctional Institution, Raiford, Florida.

The order of the Eleventh Circuit in the underlying cause is set out in Appendix A to this petition. The order of the Middle District Court of Florida is set out in Appendix B to this petition. The report and recommendation of the federal magistrate judge is set out in Appendix C to this petition. The decision of the Florida First District Court of Appeal is set out in Appendix D to this petition.

Petitioner retained attorney John D. Middleton (hereinafter "counsel"), who filed a Petition for Writ of Certiorari in this Court on April 15, 1999, from the denial of a habeas corpus appeal (28 USC §2254) in the United States Court of Appeals for the Eleventh Circuit. On June 28, 1999, the Clerk of this Court refused to accept the Petition for filing because it was not filed within the required 90-day time limit for civil cases. (Supp. Appendix A - Clerk's Letter)

Counsel takes full responsibility for his failure to make a timely filing for Certiorari in this Court. (Supp. Appendix B - Affidavit of John D. Middleton, Esq.).

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1651, pursuant to an application for an original writ of habeas corpus. Supreme Court Rule 20(4)(a)

As set forth above, Petitioner retained a private attorney to file a timely Petition for Writ of Certiorari in this Honorable Court, and counsel, admittedly, failed to make a timely filing as set forth in Rule 13.1 of this Court.[2]

In criminal appeals, this Court has long held that the 90-day time limit can be extended for good cause, such as counsel's failure to make a timely filing, holding that the Sixth Amendment right to effective assistance is applicable in such circumstances. *Schact v. United States*, 398 U.S. 58 (1961); *United States v. Mazurie*, 415 U.S. 947 (1973).

However, postconviction proceedings under 28 U.S.C. 2254 have been deemed "civil" in nature, even though they are extensions of the criminal process, and are therefore, for purposes of filing time requirements, subject to the 90-day limit for all civil cases. *United States v. Hayman*, 342 U.S. 205 (1952). As such, this Court has held that there is no Sixth Amendment right to an attorney in state postconviction proceedings because they are "civil" in nature. With no right to counsel, naturally there can be no claims of a denial of effective assistance under the Sixth Amendment. *Coleman v. Thompson*, 501 U.S. 722 (1991).

Clearly, Petitioner's case is the result of habeas corpus proceedings under

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2. Rule 13.1 prescribes that a Petition for a Writ of Certiorari be filed within 90-days of the lower tribunal's decision.

28 U.S.C. §2254, and under existing case law Petitioner cannot claim ineffective assistance under the Sixth Amendment, even though counsel has readily admitted he rendered ineffective assistance in failing to make a timely filing for Certiorari.

But in the ends of justice, Petitioner submits, requires that some relief be provided in a case such as this, where a defendant, who relies exclusively on the promises and due diligence of his privately retained attorney, and through no fault of his own, is deprived of his substantive due process right to petition the nations highest court for review of non-frivolous issues showing his innocence and illegal detention.

Certainly, if a defendant can prove that he was improperly convicted - as Petitioner contends the facts and law clearly indicate in this case - he should be set free. Therefore, if a defendant is denied the opportunity to offer such proof because of malpractice of his attorney, fundamental due process requires that he have a remedy that will address his future incarceration. Thus, even though a defendant does not necessarily have a Sixth Amendment right to counsel in postconviction proceedings, if he chooses to retain an attorney, or even if an attorney is appointed, a defendant should be able to rely on such counsel's ability to at least make required timely filings.

Therefore, Petitioner respectfully submits that he had a clearly established substantive due process right, pursuant to 28 U.S.C. §1291, to petition this Court for review; however, that right was

effectively waived and/or thwarted by the admitted malpractice of retained counsel. Counsel's deficient performance has thus denied Petitioner his right to meaningful access to the judicial process, a right Petitioner claims is his under the Fifth and Fourteenth Amendments. Accordingly, if Petitioner is denied the right to attack a presumably invalid conviction in this Court because of counsel's admitted error, then Petitioner has been denied his right to due process.

As this Court has long held, "the writ of habeas corpus is the fundamental instrument for safe-guarding individual freedom against arbitrary and lawless state action." *Harris v. Nelson*, 394 U.S. 286, 290-91 (1969).

> The scope and flexibility of the writ - its capacity to reach all manner of illegal detention - its ability to cut through barriers of form and procedural mazes - have always been emphasized and jealously guarded by courts and lawmakers. The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are sufficed and corrected.

Id., 291.

The All Writ Act provides:

> The Supreme Court . . . may issue all writs necessary or appropriate in aid of [its] . . . jurisdiction [] and agreeable to the usages and principles of law.

28 U.S.C. §1651(a).

In considering a petition for an original writ of habeas corpus, this Court has set forth the following requirements:

> (1) that the writ will be in aid of the Court's appellate jurisdiction;
>
> (2) that there are exceptional circumstances warranting the exercise of the Court's discretionary powers; and
>
> (3) that no adequate relief can be obtained in any other form or from any other court.

See: Dixon v. Thompson, 429 U.S. 1080 (1977); *Ex parte Peru*, 318 U.S. 578 (1943); *Ex parte Abernathy*, 320 U.S. 219 (1943); *Ex parte Tracy*, 249 U.S. 551 (1919).

As set forth above, Petitioner presents to this Court fully exhausted issues of clear constitutional magnitude which show that Petitioner's incarceration is illegal. Because Petitioner alleges the issues have been improperly decided by a federal appellate court, and within this Court resides the only review of federal appellate court decisions, and because review of these issues by this Court has been denied by Petitioner's counsel's admitted failure to timely file a petition for writ of certiorari, the only jurisdiction available to allow this Court to exercise its discretionary review is an original writ of habeas corpus under 28 U.S.C. §1651.

Exceptional circumstances exist in that Petitioner has been denied his substantive due process right to this Court's discretionary review of the issues presented, which Petitioner alleges were improperly decided by the lower federal court. As this Court noted in *Harris, supra*, a "petitioner, being in custody, is usually handicapped" and, as such, Petitioner in this case relied completely on the due diligence of his retained counsel to make a timely filing for certiorari, which counsel failed to do.

Accordingly, because "[t]here is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus" to prevent a person's unlawful confinement, an attorney's admitted failure to make a required timely filing in this case amounts to exceptional circumstances that warrant this Court's discretionary review under an original writ of habeas corpus. *Harris*, at 292.

Lastly, and as set forth above, Petitioner has fully and diligently exhausted <u>all</u> his state and federal remedies on the issues presented, and within this Court resides the <u>only</u> jurisdiction to review the allegedly erroneous decisions of a federal appellate court. Therefore, if the issues presented are to be reviewed, this Court must exercise its discretionary review under 28 U.S.C. §1651 in the form of an original habeas corpus petition.

STATEMENT OF CASE

(a). The Underlying Charges:

Petitioner was initially charged by information with Second Degree Murder of Thomas Etheridge and Aggravated Assault upon police officer C.E. Williams, both offenses allegedly committed on July 15, 1985. (R1-12-1-4). The Information was supplanted with grand jury indictments charging Petitioner with First Degree Murder and Aggravated Assault. (R1-12-1-13,15). Finally, by third indictment, Petitioner was charged with First Degree Murder of Thomas Etheridge and Armed Robbery of Officer Williams by taking her police car. R1-12-1-31,32).

On July 15, 1985 around 2:45 a.m., a drinking party was still in progress. All the party members were drinking heavily, including Petitioner. Petitioner was having problems with James Etheridge who ultimately pointed a gun at him and a struggle ensued. During the struggle the gun discharged killing Tommy Etheridge, James Etheridge's brother. (R1-12-XI-900, 911, 949, 950).

The jury acquitted Petitioner on the murder charge. (R1-12-XI-1027).

After the shooting accident, Petitioner waited for the police to arrive, which was around 3:00 a.m. Officer Ritchey was the first officer to arrive. Many of the party members had already departed or was attempting to depart except Petitioner.

Defense counsel questioning Officer Ritchey:

Q. And they were scattered in every direction?

A. Yes sir.

Q. Except for Mr. Bullard, who came walking right up to you?

A. You sir.

Q. Okay, and I assume at that point in time your revolver, you pulled your service revolver, did you not, sir?

A. Yes sir.

Q. And you asked this man where "Junior" was?

A. Right.

Q. And he said inside.

A. He pointed inside, said "Junior" was still inside.

Q. Okay. And I think you had indicated that he had cut-off jeans and no shirt?

A. Yes sir.

Q. Okay. So you didn't see any sign of a weapon?

A. No sir.

(R1-12-VII-485, 486).

Based upon Officer Ritchey's actions - gun drawn etc etc: and Petitioner's state of intoxication etc: Petitioner lied to Officer Ritchey and told him he was inside and left the scene on foot.

Around 4:10 a.m., some two miles from the shooting scene, female Officer C. Williams was driving west on Trout River Boulevard and came upon Petitioner who was walking west, which was back toward the scene of the shooting. She did not know if he was a suspect. Petitioner was wearing no shoes, no shirt, and cut off jeans. Officer Williams drove 7 to 10 feet up behind Petitioner, and he automatically turned to come toward her. She thought Petitioner had something in his hand, but she never saw anything, nor did she see him throw anything away. She told Petitioner to get his hands up, and he did not respond, but she wasn't sure he heard her because she was sitting in her car. She pulled her revolver because Petitioner did not put his hands up, therefore when Petitioner approached her sitting in her car he was looking down the barrel of her 38. caliber revolver, and out of fear moved out of harms way.

Defense counsel questioning Officer Williams:

Q. He walked by you and the driver's side?

A. He rushed by me.

Q. Did he run?

A. No, he rushed by me. When I had my gun he probably thought I was going to

shoot him, so he rushed by me.

Q. Did you point the gun at him?

A. As he was walking towards me, yes.

Q. Did he ever say anything to you at this point in time?

A. When he walked past me to the rear of my car, I jumped out of the car with my service revolver pulled. He said, "I don't have anything, I don't have anything." And he had his hands up then.

Obviously Petitioner did not hear Officer Williams tell him to get his hands up when approaching her.

In fact Petitioner was not armed. At this point in time Officer Williams admitted that she was so close to Petitioner that she could have touched him with her hand, and that she had her right hand extended toward Petitioner with her gun in normal firing position, waist level, and that Petitioner grabbed her wrist and put his thumb in the trigger so she couldn't pull it to shoot him, took her gun, she said he pointed at her, turned from her and got in her patrol car, which had been left with the door open and with the keys in it by Officer Williams, and drove off with the only thing Petitioner ever saying is. "I don't have anything, I don't have anything." (RI-12-120-127) (RI-12-VII-512, 518.).

Around 4:20 a.m., with darkness still complete, Officer Dover observed a Jacksonville police car on U.S. 1 in Nassau County near the Duval-Nassau County

line, he turned around and began following it. The car's driver turned off on a public road and abandoned the car, leaving the keys in it, before Officer Dover arrived at the point where the car was left. (RI-12-VII-522 through 525). The suspect's car had been traveling approximately 70 miles per hour. At no time did Officer Dover turn on his blue lights, flash his bright lights or make any indication that he was a police officer and wanted the driver of the car to stop. He immediately called for back-up which took approximately thirty minutes to arrive. (RI-12-VIII-531, 532).

Captain Misler of the Nassau County Sheriff's Office arrived with his tracking dog at the abandoned car between 4:30 to 4:45 a.m.. The dog was put on the trail between 4:45 and 5:00 a.m.. At approximately 6:00 a.m. Petitioner was spotted sitting in a truck at the residence of Alton Conner. (RI-12-VIII-536, 539, 541).

Petitioner had knocked on Mr. Alton's door and said something about "trouble." Mr. Alton's neighbor had called the police and Mr. Alton advised Petitioner that the police had been called. Petitioner waited for the police who arrived some fifteen minutes later and arrested Petitioner without incident. (RI-12-VIII-542, 719-720).

The facts show, before and after the taking of the car, that Petitioner did not have the required specific intent to rob or the required specific intent to permanently deprive the officer of her car. Petitioner submits that he is

factually and legally innocent of the crime of armed robbery.

b. The trial and defense counsel.

Attorney Randy Fallin was retained by Petitioner to represent him as lead counsel in the capital murder case. Petitioner also hired attorney Baya Harrison as "second chair" to work on the death penalty issues and to help with motions. Prior to trial Petitioner's counsel filed a Notice of Insanity Defense to the armed robbery charge. The defense was not pursued when the trial court denied Petitioner's Motion for Separate Trials and Severance of Offenses.

Attorney Fallin filed a Motion for Separate Trials and Severance of Offenses because the elements of the offenses were different; they occurred at different times and places, and there were different defenses to the two charges. Mr. Fallin did not want Petitioner's prior criminal record to come out in the murder case; therefore, he did not pursue the insanity defense based upon Petitioner's condition the night of the incident. According to Fallin, to pursue the insanity defense in the robbery charge would require Petitioner to take the stand which would have been prejudicial in the murder case. Additionally, there were alleged other uncharged criminal offenses surrounding the homicide, but which had no bearing on the subsequent stolen police car incident. The trial court initially granted the severance motion from the bench, but in a later written order the court denied the motion without explanation for the change

in ruling.

The trial court held a preliminary jury charge conference as both charged offenses progressed to trial. At the preliminary jury charge conference the trial judge read the then Florida Standard Jury Instruction defining robbery to the prosecution and defense counsel.

> Gentleman, this is the way the robbery will go. Before you can find the defendant guilty of robbery, the State must prove the following four elements beyond a reasonable doubt: number one, that the defendant took the motor vehicle from the person or custody of C.E. Williams; two, that the taking was by force, violence, assault, or by putting C.E. Williams in fear; three, the property taken was of some value; four, that the defendant took the property from C.E. Williams and at the time of the taking intended to <u>permanently deprive</u> C.E. Williams of the property, to-wit: the motor vehicle.

At the actual jury charge conference the trial court added the words "temporarily or" before the word "permanently" as a fourth element, altering the Florida Standard Jury Instruction on robbery. Neither the prosecution or defense counsel noticed the judge had changed the robbery instruction. The trial judge did not comply with *Florida Rule of Criminal Procedure 3.985* which required the judge to announce on the record or in a separate written order why the standard instruction was "erroneous or inadequate and the legal

basis of the judge's findings."

The judge also instructed the jury at trial with the same non-standard jury instruction without a contemporaneous objection from defense counsel.

The jury found Petitioner innocent of Count I, the murder charge, but found Petitioner guilty on Count II, the armed robbery charge.

Attorney Fallin filed a Motion for New Trial based in part on the giving of an erroneous jury instruction then arguing Petitioner did not have the requisite intent to permanently deprive required in robbery and the denial of the pre-trial Motion for Severance. At oral argument on the motion, Mr. Fallin acknowledged that the erroneous jury instruction "got by me . . . ." The motion for new trial was denied.

At sentencing, Petitioner was found to be a habitual offender and was given a life sentence pursuant to Florida Statute Section 775.084. Petitioner was found indigent and appointed the Public Defender for his direct appeal. Petitioner wrote nine letters to the Public Defender Michael Allen or Assistant Public Defender P. Douglas Brinkmeyer which were never responded to. As early as January 15, 1987, prior to the Initial Brief being filed, Petitioner requested that his appellate attorney raise the motion for severance issue and jury instruction issue. The Initial Brief served on February 7, 1987 raised the following as appellate points:

ISSUE I

THE LOWER COURT ERRED IN FINDING APPELLANT TO BE A HABITUAL OFFENDER AND IN USING HABITUAL OFFENDER STATUS AS THE REASON FOR DEPARTURE FROM THE RECOMMENDED GUIDELINES RANGE OF 12-17 YEARS.

ISSUE II

THE COURT'S INSTRUCTION ON THE INTENT ELEMENT OF ROBBERY CONSTITUTED FUNDAMENTAL ERROR AND A DENIAL OF DUE PROCESS, DENYING THE DEFENDANT A FAIR TRIAL ON THE ARMED ROBBERY CHARGE.

Appellate counsel did not raise the trial court's denial of the severance motion because, in his opinion, trial counsel must renew a denied written pre-trial motion for severance before or during the trial in order for it to be properly preserved for appeal. At the hearing, appellate counsel could not cite any case supporting this proposition. *Florida Rules of Criminal Procedure* 3.153 requires a defendant's motion for severance be made before trial unless there are reasons that it could not be made before trial. The right to file such motion is waived if it is not timely made.

Appellate counsel raised the jury instruction as fundamental error because trial counsel failed to contemporaneously object to the non-standard jury instruction on robbery. In *Bullard v. State*, 515 So.2d 1028 (Fla. Dist. Ct. App. 1987), the Florida appellate court held that the erroneous jury instruction was

not fundamental error because, "There was evidence that appellant did not abandon the stolen car until hours after it was stolen and only when a deputy sheriff in another county began following him. Appellant was obviously not out for a joy ride." *Bullard,* 515 So.2d at 1030.

The Florida appellate court, however, erred when it concluded Petitioner had possession of the police vehicle for hours; Petitioner was in the car approximately 10 to 15 minutes. The State finally admitted this error on appeal before the Eleventh Circuit: "First, we agree that the First District Court of Appeal misspoke when, in *Bullard v. State*, 515 So.2d 1028 (Fla. 1st DCA 1987), it stated that Bullard had the stolen car for 'hours'". (State's Answer Brief at 8).

The State Court of Appeal, therefore, would have overturned Petitioner's conviction based on the jury instruction but for its erroneous fact-finding. The appellate court did overturn Petitioner's life sentence finding that it was error for the trial court to exceed the guidelines based upon Petitioner's status as a habitual offender. *Bullard*, 515 So.2d at 1029.

On resentencing, again the trial court sentenced Petitioner to life without parole. The guidelines sentence was stipulated by the prosecution to be seven to nine years at resentencing. The trial court's departure from Florida's sentencing guidelines was based on the fact that a police officer was the victim of the robbery.

ISSUES PRESENTED

ISSUE 1:

THE PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF TRIAL COUNSEL

(a). History of Interpretation of Florida Robbery Statute by the Supreme Court of Florida:

At common law and under the former robbery statute, Section 813.011, F.S. (1973) and its predecessor, an intent to "permanently deprive" the owner of his property was an essential element of the offense. *Montsdoca v. State*, 84 Fla. 82, 93 So. 157 (1922); *Bailey v. State*, 199 So.2d 726 (Fla. 1st DCA 1967).

In 1975, the Florida Legislature enacted Section 812.13, F.S., and in so doing omitted the "felonious" taking from the new statute.

In *Bell v. State*, 354 So.2d 1266 (Fla. 3rd DCA 1978), a Florida Appellate Court determined that the new robbery statute had done away with the element of specific intent to permanently deprive. However, the appellate court certified the following question to the State Supreme Court:

> Whether specific intent (i.e. the intent to <u>permanently</u> <u>deprive</u> the owner of property) <u>is</u> <u>still</u> a requisite element of the crime of robbery as now defined by Section 812.13, Florida Statutes (1975). (emphasis added)

Id. pg. 1267

In *Bell v. State*, 394 So.2d 979 (1981), the Supreme Court of Florida answered that certified question in the "affirmative," and held that the specific intent to "permanently deprive" an owner of property was still an element of the crime of robbery in Florida.

In *Stewart v. State*, 420 So.2d 862 (1982) the state Supreme Court reaffirmed *Bell*, again stating that permanent deprivation was a requisite element of robbery.

In *State v. Dunnman*, 427 So.2d 166 (1983), the state Supreme Court, responding to a clarification of Chapter 77-342, Laws of Florida, held that the intent to "temporarily" or "permanently" deprive an owner of property was a required element of theft. (Section 812.014, F.S.) However, the Court again reaffirmed *Bell*, stating:

> While section 812.13 (Robbery) deals with a similar subject, we do not find that chapter 77-342 had an impact on [section 812.13]. By the same token section 812.13 has no impact on the sections involved in this opinion. Therefore, we find Bell to have no effect on the instant case. (emphasis added)

Id., 427 So.2d 169.

In *State v. Gray*, 435 So.2d 816 (1983), again reaffirmed *Bell* on the element of permanent deprivation.

To further demonstrate the state Supreme Court's adherence to *Bell*, the *Florida Standard Jury Instructions in Criminal Cases*, 543 So.2d 1205, 1215 (1989), added the following to the jury instruction for robbery (Section 812.13, F.S.):

> 4. The taking was with the intent to permanently [deprive] (victim) of property or any benefit from it.

Subsequently, the state Supreme Court revisited this issue in *Daniels v. State*, 587 So.2d 460 (1991), and reversed its position in *Dunnman, supra,* and held that Chapter 77-342 did impact Section 812.13 (Robbery), and that the intent to "temporarily" or "permanently" deprive were required elements for robbery. In so doing, the Court did not over turn *Bell*, it merely "receded" from its previous decision therein.

Accordingly, from at least 1922 until 1991, when *Daniels* was announced, the specific intent to "permanently deprive" an owner of property was a required element of the crime of robbery in the State of Florida.

As the state Supreme Court stated in *Daniels*, "[t]he requirement of permanent deprivation . . . has never been a statutory element of larceny or robbery." Id. 587 So.2d 462. Of course, neither "temporary" nor "permanent" deprivation actually appeared as words in the statute to include both those elements. See Chapter 92-155, F.S., effective October 1, 1992.

Therefore, until the aforementioned legislative change in the robbery statute, *Bell* and its progeny requiring "permanent" deprivation as a requisite element of robbery was the judicial interpretation of the Florida robbery statute by the highest court in the State.

(b) United States Supreme Court Law as it Applies to the Supreme Court of Florida's Interpretation of the Robbery Statute:

In *Wainwright v. Stone*, 94 S.Ct. 190 (1973), this Court reversed the federal court of appeals and held that:

> For the purpose of determining whether a state statute is too vague and indefinite to constitute valid legislation "we must take the statute as though it read precisely as the highest court of the state has interpreted it." *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 507, 514, 68 S.Ct. 665, 669, 92 L.Ed. 744 (1940). When a state statute has been construed to forbid identifiable conduct so that "interpretation by [the state court] puts these words in the statute as definitely as if it had been so amended by the legislature," claims of impermissible vagueness must be judged in that light. *Winters v. New York*, 333 U.S. 507, 514, 68 S.Ct. 665, 669 92 L.Ed. 840 (1948) (Emphasis added)

Id., at 94 S.Ct. 192.

In 1985 when the alleged robbery offense occurred, the Robbery statute read

as follows:

812.13 Robbery

(1) "Robbery" means the taking of money or other property which may be the subject of larceny from the person or custody of another by force, violence, assault, or putting in fear.

It is obvious from reading the above robbery statute that nothing in the statute specifically refers to either "permanent" or "temporary" deprival of property. However, in interpreting that statute, the State Supreme Court made "permanent" deprivation a required element of Robbery "as definitely as if it had been so amended by the [state] legislature." *Id., Stone*, 94 S.Ct. 192. *See Bell v. State, Stewart v. State, State v. Dunnman and State v. Gray, Supra.*

Accordingly, "permanent" deprivation was an essential, required element of the crime of Robbery in the State of Florida until the State Supreme Court reinterpreted that statute in *Daniels*, supra, (1991), making "temporary" deprivation also a required element.[3]

The petitioner in *Wainwright v. Stone* argued that a subsequent interpretation of a state statute by the Supreme Court of Florida, which was favorable to

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[3]. The State legislature amended the Robbery statute to include "temporary" deprivation, effective October 1, 1992.

petitioner's position, should be retroactively applied.

However, this Court held that:

> The State Supreme Court did not overrule *Delaney* with respect to pre-*Franklin* convictions. Nor was it constitutionally compelled to do so or to make retroactive its new construction of the Florida Statute: "A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transaction." (citation omitted)

Stone, 92 S.Ct. 193.

The Supreme Court of Florida did not make its decision in *Daniels, supra*, retroactive, nor could it have done so without running afoul of both the state and federal constitutional prohibitions against criminalizing conduct after the act was committed. The *Ex Post Facto* clause of both the State of Florida and the United States Constitutions prohibit retroactive application of *Daniels*. This Court has long held that a change in the standard of proof, so as to require less proof than the law required at the time of the commission of an offense, in order to convict the accused, amounts to an *ex post facto* violation within constitutional prohibition. *Calder v. Bull*, 3 U.S. 836 (1798); *Cummings v. Missouri*, 71 U.S. 277 (1867); *Gut v. State*, 76 U.S. 35 (1870);

Kring v. Missouri, 107 U.S. 221 (1883); *Duncan v. Missouri*, 152 U.S. 377 (1894); *Mallet v. North Carolina*, 181 U.S. 589 (1901); *Malloy v. South Carolina*, 237 U.S. 180 (1915); *Collin v. Youngblood*, 497 U.S. 37 (1990).

Likewise, the Due Process Clause would forbid the retroactive application of *Daniels* in applying a jury instruction for Robbery that included an intent to "temporarily" deprive. *Bouie v. City of Columbia*, 378 U.S. 347 (1964); *Marks v. United States*, 430 U.S. 188 (1977). *Bouie* and *Marks* hold that jury instructions that amount to a judicial enhancement of liability under a criminal statute cannot be applied retroactively.

> When a . . . state-court construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect is to deprive him of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime.

Bouie, 378 U.S. at 352.

(c) The Petitioner Received Ineffective Assistance of Trial Counsel for Failure to Object to An Erroneous Jury Instruction Adding the Intent to "Temporarily" Deprive to a Charge of Robbery.

In *Strickland v. Washington*, 104 S.Ct. 2052 (1984), this Court established the now well-known, two-part test for ineffective assistance of counsel:

> First, the [criminal] defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. 104 S.Ct. 2064.

(A) *Trial Counsel was Deficient Under Strickland*

As shown above, under Florida law in 1985, the date of Petitioner's alleged offense, "permanent" deprivation was an essential element of the crime of robbery, and "temporary" deprivation was not.

Petitioner's offense involved the disarming of a deputy sheriff and then driving away with her marked police car. The trial record shows, and the State agrees, that Petitioner kept the marked police car for at most 10 to 15 minutes, and then abandoned it on a public road, leaving the keys in the ignition (R1-12-VII-522-525).

Petitioner was convicted of robbery by use of an erroneous and improper jury instruction that included an intent to "temporarily" deprive an owner of property. Defense trial counsel failed twice to object to the erroneous jury

instruction when the trial judge changed the jury instruction without notice between the preliminary charge conference and the jury announcement. (R1-12-VIII-601; R1-12-X-827; R1-12-XI-990).

Both defense trial counsels testified at the federal evidentiary hearing that they overlooked that the trial court had spontaneously altered the jury instruction previously discussed with defense counsel. (R3-61; 161-162) Chief defense counsel testified that he believed he was ineffective for not objecting because ". . . it went to the heart of what the jury got as the law, and it's wrong. And that's part of our job, is to make sure that doesn't happen." (R3-66).

Bell v. State, (1981) held that the specific intent to permanently deprive was the *only* requisite intent to deprive in the crime of robbery. This notwithstanding, the jury was erroneously instructed, without objection by defense counsel, that Petitioner could be found guilty of robbery if he had either the intent to "temporarily" or "permanently" deprive the owner of her property. (R1-12-XI-990).

As noted above, several years before and after Petitioner's trial, numerous Florida appellate courts, relying on the State Supreme Court's decisions in *Bell*, *Stewart*, *Dunnman*, and *Gray*, held that an instruction permitting a jury to find an accused guilty of robbery by finding anything other than the specific intent to "permanently" deprive was reversible error. See, *Vaugh v. State*, 460 So.2d 505 (Fla. 3rd DCA 1984); *Hall v. State*, 505

So.2d 657 (Fla. 2nd DCA 1987).

Therefore, the failure by Petitioner's counsel to object to the erroneous jury instruction "cannot be considered to be within the 'wide range of professionally competent assistance.'" *Ricalday v. Procunier*, 736 F.2d 203, 207 (5th Cir.1984) (quoting *Strickland*, 104 S.Ct. at 2066).

(B) *Petitioner was Prejudiced by Trial Counsel's Deficient Assistance.*

In order to demonstrate prejudice under the second prong of *Strickland*, Petitioner must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 104 S.Ct. at 2068 (emphasis added).

Applying the prejudice standard to Petitioner's case, the obvious question to be answered: Is there a reasonable probability that the jury would have had a reasonable doubt as to Petitioner's guilt if the words "temporarily deprive" had not been included in the charge to the jury on the elements of robbery?

As set forth above, the evidence presented at trial clearly showed Petitioner took the marked police car, then drove the marked police car some 8 to 9 miles away, and abandoned it on a public road with the keys in the ignition. (R1-12-VII-522-525). Thus, there was more than sufficient reason for the jury in

this case to conclude Petitioner did not have the specific intent to "permanently" deprive the officer of her police vehicle. See, *Herring v. Estelle*, 491 F.2d 125 (5th Cir. 1974) (Inmates who rushed and beat jailer, then took his keys and escaped, leaving keys in back door, not guilty of robbery under Texas law because no intent to permanently deprive existed).

Interestingly, trial counsel's so-called strategy, as will be discussed further infra, was to show no robbery had occurred, merely a "theft." In 1985, under Florida law, a person could be found guilty of "theft" if he had the intent to "temporarily" or "permanently" deprive an owner of his property.

During deliberations the jury asked the trial judge "can we charge the defendant with aggravated assault and Grand Theft or can we charge Grand Theft with a weapon?" (R1-12-XI-1009). Thus, the jury was clearly leaning toward a "theft" conviction; however, the erroneous jury instruction on robbery, regarding "temporary" deprivation, appears to have been the only justification for the jury's guilty verdict on robbery. The jury was allowed to convict Petitioner based upon the illegal expanded element of robbery, "temporary" deprivation; therefore, Petitioner was prejudiced under the second prong of *Strickland* by trial counsel's failure to properly object. As such, a "reasonable probability" exists that Petitioner would not have been convicted of robbery except for counsel's error.

(C) *The U.S. Magistrate Judge's Report and Recommendation:*

First, the Magistrate's contention that counsel's failure to object to the erroneous jury instruction was reasonable due to trial "strategy" flys in the face of constitutional law and the jurisprudence of this Court.

Pursuant to *Wainwright v. Stone*, the State Supreme Court in *Bell v. State* made the intent to "permanently" deprive an essential element of robbery, just as if the robbery statute had been so amended by the legislature. Accordingly, no reasonable trial strategy could possibly avoid putting the State to its constitutional burden of proving all elements beyond a reasonable doubt. Since trial counsel's so-called strategy allowed the state to avoid its burden of proof -- and certainly the state did not prove Petitioner's intent to "permanently" deprive - and the erroneous instruction added an element (temporary deprivation) that acted to relieve the state of its burden to prove "permanent" deprivation. This Court has held that "the prosecution's burden to prove every element of the crime is not relieved by a . . . tactical decision not to contest an essential element of the offense." *Estelle v. McGuire*, 502 U.S. 62, 69 (1991).

Also, trial counsel must have seen the error in their strategy because, as noted by the Magistrate, counsel filed a motion for new trial based upon the erroneous instruction arguing Petitioner did not have the requisite intent to

permanently deprive under *Bell*, supra. And both trial counsels stated at the federal evidentiary hearing that they simply "missed" the trial court's spontaneous addition of the erroneous instruction, and their failure to object had "no strategic" value whatsoever.

Accordingly, the Magistrate's finding that counsel's failure to object to the erroneous instruction was reasonable trial strategy has no basis in law, and is in fact contrary to this Court's precedent in *McGuire* and *Mathews v. United States*, 485 U.S. 58 (1988).

Second, the Magistrate misapplied the Court's decision in *Lockhart v. Fretwell*, supra, by finding the erroneous jury instruction, which is now correct based on subsequent case law, would be given if Petitioner were retried on the robbery charge. The Magistrate incorrectly found that Petitioner had no "constitutional right" to now have a jury instructed on the elements of the offense (State of the law) at the time the offense occurred.

This Court has recently clarified the *Fretwell* decision, stating:

> Cases such as *Nix v. Whiteside*, 475 U.S. 157 (1986), and *Lockhart v. Fretwell*, 506 U.S. 364 (1993), do not justify a departure from a straight forward application of Strickland when the ineffectiveness of counsel does deprive the defendant of a substantial or procedural right to which the law entitles him.

William v. Taylor, No. 98-8384 (April 18,

2000).

The Magistrate seems to have missed the fact that the erroneous jury instruction set forth an essential element of the crime of robbery - temporary deprivation - that was not an essential element of that offense at that time, according to the State Supreme Court's interpretation of that statute. Thus, that instruction criminalized conduct that was not criminal at the time of the offense.

As such, the *Ex Post Facto* and Due Process clauses of the United States Constitution would prohibit a state court upon a re-trial of Petitioner's robbery charge from using a jury instruction that included the element of "temporary" deprivation.

The Magistrate failed to note that the State Supreme Court decisions, placing first the element of "permanent" deprivation, *Bell v. State*, and then "temporary" or "permanent" deprivation as elements, *Daniels v. State*, were judicial interpretations of a state robbery statute that, on its face, contained no mention of either "permanent" or "temporary" deprivation.

However, as set forth above, this Court has long held that a State Supreme Court's interpretation of a state statute that defines the elements of that statute, are just as binding as if "amended by the [state] legislature." *Wainwright v. Stone*, 94 S.Ct. at 192. Furthermore, an accused must be tried under such a judicially interpreted statute that was in

effect at the time of the alleged offense. Id. at 193.

Since Petitioner was denied clearly defined constitutional rights, and the State Supreme Court's decision in *Bell*, along with that Court's subsequent decision affirming *Bell*, were not "lawless decisions" as defined in *Fretwell*, the Magistrate's analysis under *Fretwell* is clearly in error and has no basis in law.

Third, the Magistrate concluded that the jury would have convicted Petitioner even if the proper instruction had been given. This clearly goes against the evidence presented at trial.

A jury is presumed to follow instructions. *Yates v. Evatt*, 500 U.S. 391 (1991). In this case, it is clear the jury paid attention to the instructions, a copy of which was given to the jury in deliberations. And as noted above, the jury asked the trial judge certain pertinent questions about convicting Petitioner of the lesser included offense of Grand Theft, an offense where "temporary" taking was a correct requisite element. (RI-12-XI-1009).

There was also no evidence presented at trial to show Petitioner had an intent to permanently deprive the police officer of her vehicle. The Magistrate did not cite any record support for his conclusion that the improper jury instruction did not infect the outcome of the jury's verdict on the robbery charge. Accordingly, the Magistrate's conclusion to the contrary has no basis in fact or law.

(d) *The Petitioner Received Ineffective Assistance for Failure To Argue Specific Intent To Rob and/or Permanently Deprive in the Robbery Case.*

The State of Florida was required to prove the Petitioner had the specific intent to permanently deprive the owner of her vehicle to prove robbery. *Bell v. State*, 394 So.2d 979 (Fla. 1981). Petitioner's trial counsel, however, failed to make the obvious argument to the jury and trial court that Petitioner did not intend to permanently deprive the police officer of her vehicle.

As shown above, the evidence presented at trial toward the robbery charge lacked any proof that Petitioner had the specific intent to permanently deprive. Therefore, by failing to inform, educate, and argue to the jury and trial court[4] that the State had failed to offer proof of that requisite element, counsel unwittingly relieved the State of its burden of proof. Because this Court, over 30 years ago, declared that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged," *In Re Winship*, 397 U.S. 358, 364 (1970) (emphasis added). Any decision, tactical or otherwise labeled, to forego holding the State to

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[4]. Counsel failed to argue in the Motion For judgment and Acquittal that the State had failed to offer any proof of the specific intent to permanently deprive.

its strict burden of proof on the element of intent to permanently deprive, or failing to argue to the jury and the trial court that the State had not met its burden to show the requisite intent, was not a "reasonable" decision under *Strickland*.

As to prejudice, because the State failed in its burden of proof on intent, prejudice is evident. Petitioner has the right protected under the Due Process Clause, and the Fourteenth Amendment, United States Constitution, against conviction unless the State proves all elements beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307 (1979).

The Magistrate below concluded there was sufficient testimony for a jury to convict on the officer's testimony about Petitioner taking the police car. (R2-43-52). This reading of the police officer's testimony is not reflected in the record itself, and, is not supported in any portion of the trial record. Furthermore, taking <u>all</u> the evidence presented at trial collectively, and in a light most favorable to the State, the evidence, at best, showed Petitioner's intent was to "temporarily" deprive the officer of her police car. And under the law at the time in the State of Florida, Petitioner could have only been convicted of grand theft based on an intent to "temporarily" deprive.

ISSUE II:

THE IMPROPER JURY INSTRUCTION FOR ROBBERY VIOLATED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

An erroneous jury instruction is analyzed as to "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way" that violated the Constitution. *Estelle v. McGuire*, 502 U.S. 62 (1991). The Magistrate judge denied federal habeas relief by stating the instruction did not infect the whole trial with error.

As previously noted and argued, this finding is based upon erroneous factual conclusions which are used to support illogical inferences. (See Issue I a. and b. above).

The federal Magistrate appears to be ruling that the jury would have convicted Petitioner even if the proper instruction had been given. This goes against the evidence presented at trial.

A jury is presumed to follow instruction. *Yates v. Evatt*, 500 U.S. 391 (1991). In the present case, it is clear the jury paid attention to the instructions, a copy of which were given to the jury in deliberations. During deliberations the jury asked the trial judge "can we charge the defendant with aggravated assault and Grand Theft or can we charge Grand Theft with a weapon?"

There was also no evidence that Petitioner had an intent to permanently deprive the police officer of her cruiser.

The Magistrate did not cite any record support for his conclusion that the improper jury instruction did not infect the entire trial.

In *United States v. Hudson*, 564 F.2d 1377 (9th Cir. 1977), *Hudson* was convicted of armed post office robbery. the proper jury instruction was "before it could find that the defendant had put the postal clerk's life in jeopardy by use of a dangerous weapon, it must find that the gun was loaded at the time of the crime." The trial court explained the proper jury instruction by giving an unobjected to instruction that included exposing a person to a risk or fear of death in defining "jeopardizing." The Ninth Circuit held ". . . the instruction allowed for the possibility of conviction on an improper basis. . . . we hold that the error was plain and manifestly prejudicial to substantial rights." Id. note 3 at 1380. See also *Bastiste v. Blackburn*, 786 F.2d 784 (5th Cir. 1986).

In the present case there is no question that it is reasonably probable that the jury convicted Petitioner on the improper "temporary" deprivation part of the jury instruction.

The Magistrate Judge also denied relief because the Florida Supreme Court changed the definition of robbery after Petitioner's offense date. The Magistrate concludes the new definition will be given at retrial, and therefore, no prejudice results to Petitioner based on *Lockhart v. Fretwell*, 506 U.S. 364 (1993). As shown above, this is a misapplication of *Fretwell*.

ISSUE III:

PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

Petitioner is entitled to effective assistance of appellate counsel. *Evitts v. Lucy*, 469 U.S. 387 (1985); Amends. VI, XIV, U.S. Const. The failure to brief and argue meritorious issues is ineffective assistance of appellate counsel. *Mayo v. Henderson*, 13 F.3d 528 (2d Cir. 1994). This Court reviews whether the omitted claims had a reasonable probaility of success on direct appeal. *Heath v. Jones*, 941 F.2d 1126, 1132 (11th Cir.1991). It need not be assured that the omitted claim would have prevailed had it been presented. See *Mayo v. Henderson*, 13 F.3d 528, 533-34 (2d Cir. 1994).

In Petitioner's case, trial counsel properly filed a motion for severance of charges, which the trial court improperly denied. The State charged Petitioner with First Degree-Murder, occurring on Allen Road around 2:30 a.m. and robbery with a firearm at 4:15 a.m. at a different location. The offenses were not related temporally or by location, nor did they affect the same victim. The charges were not related in an "episodic" sense. *Paul v. State*, 385 So.2d 1371 (Fla. 1980). Petitioner's appellate counsel failed to raise the severance issue on direct appeal, wrongly believing it had not been preserved. Trial counsel filed a written Motion for Severance as contemplated under Fla. R. Crim. R. 3.216 upon which the trial court had oral argument. (R1-12-2-40-181). Trial counsel raised the court's denial of the motion again in their motion

for new trial. (R1-12-2-303-305).

The Magistrate did not reach whether counsel's performance was deficient. (R2-43-44). Rather, the Magistrate below found there was no prejudice resulting because the severance issue could not succeed on direct appeal in state court under an abuse-of-discretion standard. (R2-43-46 through 48).

The Magistrate's "no prejudice" conclusion flatly contradicts the earlier three assertions that failure to sever charges prejudiced raising an intoxication/insanity defense, (R2-43-15), prejudiced raising the issue of intent to permanently deprive, (R2-43-23), and prejudiced raising the erroneous jury instruction, (R2-43-31).

Further, the Magistrate correctly recites the state court judge abruptly reversed without explanation an earlier, reasoned ruling severing the charges. The trial judge initially stated the reasons for the severance in forceful language: "I grant the motion for severance. I don't think that there's any relationship at all between the robbery and the murder. I think the distance, the time, and the space between one and the other have nothing to do except that the defendant was leaving the general area and I think it would be error to try them both together." (R1-12-IV-65-66). The sudden, unexplained reversal by the state trial judge trumpets abuse of discretion having merit on direct state appeal. See *United States v. Brown*, 479 F.2d 1170, 1173 (2d Cir. 1973) ("A Sphinx-like silence on the court's part precludes anyone (including

the parties, the judge, and an appellate tribunal) from learning whether he acted in error."). Again it appears the Magistrate's findings are without factual or legal basis.

Petitioner has an indubitable Due Process right against improper joinder of charges. *Panzavecchia v. Wainwright*, 658 F.2d 337 (5th Cir. 1981). In this federal habeas proceeding, the Magistrate correctly notes Petitioner repeatedly wrote to his appellate counsel with instructions to raise the severance issue, and appellate counsel never once replied. (R2-43-43). Besides violating the professional duties of loyalty to and communication with the client, *Fla. R. Prof. R.* 4-12(a), 4-1.4, appellate counsel's refusal to respond to the client destroyed any attorney-client relationship. The undisputed failure of appellate counsel to communicate with or obey client orders effectively stripped Petitioner of his right to counsel and appeal.

Petitioner's state appellate counsel was further ineffective for failing to raise on direct appeal the state trial court's denial of trial motions for judgment of acquittal and new trial based on the insufficiency of evidence. Appellate counsel, despite case law cited by trial counsel, did not raise these issues.

ISSUE IV:

PETITIONER WAS DEPRIVED OF HIS RIGHT TO DUE PROCESS AND HIS LIBERTY INTEREST ON RESENTENCING

The issue presented is whether the trial judge at resentencing of the Petitioner arbitrarily and capriciously abused his discretion thereby depriving Petitioner of his due process and liberty interest.

When originally sentenced the trial court exceeded the guidelines recommendation due to Petitioner's qualifications as a habitual offender. (RI-12-2-355-359).

Petitioner appealed. In reversing Petitioner's sentence the First District Court of Appeals found accordingly, in pertinent part:

> "The trial court exceeded the guidelines recommendation due to appellant's qualifications as a habitual offender. This was error under the holding in Whitehead Supra, wherein the Supreme Court held that habitual offender status is not an adequate reason to depart from the sentencing guidelines."

See *Bullard v. State*, 515 So.2d 1028-1029 (Fla. 1st DCA 1989)

On December 28, 1987, the mandate in *Bullard, supra*, was issued and the aggravating departure reason, habitual offender, was established as the "law of the case."

Since the only ground assigned for the first departure was the legally insufficient one concerning Petitioner's status as an habitual offender *Shull v. Dugger*, 515 So.2d 748 (Fla. 1987), "mandates the conclusion that no subsequent departure based on any other ground may be allowed to stand." *Harris v. State*, 520 So.2d 689 (Fla. 3d DCA 1989).

The rule under *Shull supra*, applies "even if the only reason(s) given for departure was valid at the time under appellate decisions which had considered it but was later invalidated by the Supreme Court and new, valid reasons for departure existed at the time of the original sentence." Id., at 749 *See Hayes v. State*, 526 So.2d 167 (Fla. 1st DCA 1988), the trial court based its departure on the habitual offender determination. The state asked the First DCA to remand for resentencing and allow the trial court to depart upon other reasons, "Victim Injury." The First DCA held:

> "We cannot honor the request. "The Florida Supreme Court has ruled that a trial court may not enunciate new reasons to support a departure sentence after the original reasons have been held invalid by an appellate court. *Shull v. Dugger*, 515 So.2d 748 (Fla. 1987) (emphasis added). Therefore, we reverse and remand for resentencing within the guidelines recommendations." *Id* @ 166.

See *Wyche v. State*, 576 So.2d 884 (Fla.

1st DCA 1991), in which the court also departed for the habitual offender reason, in reversing and remanding, the First District held:

> "When all departure reasons given have been reversed on appeal, trial court on remand is not authorized to articulate new reasons for departure." citing *Shull, Supra.*

In *Morganti v. State*, 498 So.2d 557 (Fla. 4th DCA 1986). On remand the trial court again departed from the guidelines for different reasons, and the appellate court affirmed 510 So.2d 1182. However, the Court certified the following questions of great public importance:

> Whether, when the sole reasons initially given for departure from the guidelines was held to be valid by appellate courts at the time of sentencing, but is subsequently held invalid by the Supreme Court, the trial court on remand may depart from the guidelines, if the new reasons given existed at the time of the original sentencing and, are valid reasons for departure.

The Supreme Court held:

> We have answered the question in the negative in *Shull v. Dugger*, 515 So.2d 748 (Fla. 1987), and today reaffirm that holding. Accordingly, the opinion below is quashed and this cause is remanded for proceedings consistent with Shull. Because no valid reasons remain for departure

sentence in this instance, the District Court on remand shall direct that petitioner be sentenced within the guidelines. *Morganti v. State*, 524 So.2d 641, 642 (Fla. 1988).

The law is clear that trial courts are not authorized under the law to depart from a guidelines sentence after the original reason(s) for departure have been reversed by an appellate court as being invalid, because no valid reasons remain for departure. *Morganti supra, Pope v. State*, 561 So.2d 554 (Fla. 1990).

At the resentencing hearing the trial judge admitted that he relied upon the habitual offender statute to originally depart (RI-12-Four Brown Folders Vol. II 41-43). That in the trial judges subsequent sentencing order he also admitted he relied on the habitual offender statute to originally depart (RI-12 Four Brown Folders Vol. 1-125). But also in the trial judges subsequent resentencing order after admitting he originally used the habitual offender statute to depart, on the very next page he contradicts himself and states that in his 1986 (original) sentence he "clearly articulated two (2) reasons to exceed the sentencing guidelines." (RI-12 Four Brown Folders Vol. 1-126).

The trial judge went on to say that he clearly articulated the habitual offender and police officer victim reasons by dividing paragraph 5, supra of his 1986 sentence order into the component parts.

The trial judge used the police officer victim aggravating departure

reason to exceed Petitioner's 7 to 9 guidelines sentence and again imposed another life sentence with a mandatory minimum three year sentence (RI-12- Four Brown Folders Vol. 1-126-130).

The trial judge was required, and his discretion was limited, as a matter of law, to resentence Petitioner within his recommended guidelines sentence of 7 to 9 years.

Petitioner has a right to due process at sentencing. A deprivation of that right is not merely a matter of state procedural law, but is a liberty interest that the Fourteenth Amendment preserves against arbitrary deprivation by the state. *Haynes v. Butler*, 825 F.2d 923 (5th Cir. 1987) citing *Hicks v. Oklahoma*, 447 U.S. 343 (1980). Although *Hicks*, supra, dealt with discretion of a jury in sentencing, the same rule applies to judges. *Pratter v. Maggio*, 686 F.2d 346 (5th Cir. 1982).

Relief may be required where Petitioner, as here, is able to show that the sentence imposed . . . is wholly unauthorized by law, devoid of discretion or amounted to an arbitrary or capricious abuse of discretion depriving the Petitioner of his liberty. *Haynes, supra*, at 924.

In the present case, the record reflects that the trial judge overlooked where the First District Court of Appeals found that he originally exceeded Petitioner's guidelines sentence solely due to his qualification as a habitual offender, *Bullard* at 1029, in which was

established as the "law of the case."

The record also reflects that the trial judge overlooked controlling case law, *Shull, supra*, and that he made an incorrect statement that he relied also on "Victim Police Officer" in his original sentence as a departure reason. Petitioner was denied due process at his resentencing. Petitioner has a liberty interest right that the Fourteenth Amendment preserves against arbitrary deprivation by the state.

ISSUE V:

THE LIFE SENTENCE IMPOSED ON RESENTENCING VIOLATED THE DUE PROCESS/EX POST FACTO CLAUSES.

Petitioner challenged whether the trial court's retroactive application of the later developed aggravating departure law consisting of the victim's police officer status violated the Due process and/or the Ex Post Facto Clause.

The Magistrate judge summarily ruled the claim should be denied based on an analysis presented somewhere between pages 10 and 34 of the Report and Recommendation discussing ineffective assistance of trial counsel. (R2-43-53).

The aggravating departure law, victim law enforcement officer was approved in *Baker v. State*, 466 So.2d 1144 (Fla. Dist. Ct. App. March 26, 1985).

The *Baker* court, Third District, stayed the issuance of its mandate upon certification to the Supreme Court of

Florida. The Supreme Court in *State v. Baker*, 483 So.2d 423 (Fla. February 6, 1986) approved the Third District's decision on the departure law, and issued its mandate on March 5, 1986, thereafter the Third District issued its mandate on March 11, 1986.

The constitutional provision governing adoption of rules of practice and procedure provides the Supreme Court exclusive authority to adopt rules for practice and procedure in all state courts. Florida Constitution, Article V § 2 (a).

Therefore, the aggravating departure law was not effective law until approved by the Supreme Court in *State v. Baker, Supra.*

The *State v. Baker, Supra*, decision occurred February 6, 1986. Petitioner's offense occurred July 15, 1985. That the trial court's utilization of an unforeseeable judicial enlargement of the guidelines statute in *State v. Baker*, supra, to depart from Petitioner's presumptive guidelines sentence of 7 to 9 years and instead imposed a life sentence would be retroactively applied and disadvantaged Petitioner operating precisely like an Ex Post Facto law depriving Petitioner of Due process which is protected by and through the Fifth and Fourteenth Amendments. *Marks v. United States*, 430 U.S. 188-193 (1977).

Moreover, the Florida legislature did not constitutionally enact "victim law enforcement officer" until 1993 when it passed Chapter 93-406 which amended §

921.0016(3) (h) to include this aggravating factor. The Legislature noted that in 93-406 that the amendment would be effective January 1, 1994 to sentencing for offenses that occurred on or after that date. The Florida Supreme Court has interpreted the statute in the same manner. *Cohens v. State*, 656 So.2d 525 (Fla. Dist. Ct. App. 1995). There is no dispute that retroactive application of changes in the Florida Sentencing guidelines that enhance a criminal penalty violates the Ex Post Facto Clause of *Article I, § 10, United States Constitution. Miller v. Florida* 482 U.S. 423 (1987).

The United States Supreme Court considers *Ex Post Facto* violations fundamental error and will reverse even where there is a guilty plea. *Patterson v. State*, 513 So.2d 1263 (Fla. 1987) overturned by the United States Supreme Court at *Patterson v. Florida*, 482 U.S. 924 (1987). To the extent the Magistrate relied upon the Report and Recommendation conclusions for ineffective assistance of trial counsel to deny relief on this issue, Petitioner incorporates his arguments presented in issue III above of why those reasons are in error.

CONCLUSION

WHEREFORE, for all the foregoing reasons and for good cause shown, Petitioner respectfully requests this Court to Grant the writ.

Respectfully,

Eston Bullard Jr.

Eston Bullard Jr. 008037
Union Correctional Institution
P.O. Box 221 Box K-21
Raiford, Florida 32083

I UNDERSTAND THAT ANY FALSE STATEMENT IN THIS APPLICATION WILL SUBJECT ME TO THE PENALTIES OF PERJURY (A FINE OF $10,000 OR IMPRISONMENT FOR FIVE (5) YEARS, OR BOTH).

I HEREBY DECLARE, under the penalty of perjury that I have read the foregoing Petition for Writ of Habeas Corpus and the facts and matters are true and correct pursuant to Florida Statute 92.525 (1999) and 28 U.S.C. § 1746.

Executed this 23 day of June, 2000.

Respectfully,

Eston Bullard Jr.

Eston Bullard Jr. 008037

INDEX TO APPENDIX

Judgment of the Eleventh Circuit

Opinion of the Eleventh Circuit

Order of the United States District Court

Report and Recommendation

Opinion of Florida
First District Court of Appeals

SUPPLEMENTAL APPENDIX

Supp. Appendix A
Clerk's Letter

Supp. Appendix B
Affidavit of John D. Middleton, Esq.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for Writ of Habeas Corpus has been furnished to: Office of the Attorney General, The Honorable Robert A. Butterworth, Attorney General, State of Florida, The Capitol, Tallahassee, Florida 32399-1050, by U.S. Mail on this 23 day of June 2000.

Respectfully,

Eston Bullard Jr.

Eston Bullard Jr. 008037

BEST AVAILABLE COPY

United States of Appeals
FOR THE ELEVENTH CIRCU T

No. 97-3409
Non-Argument Calendar

District Court Docket No. 94-808-C 1v-J-20

ESTON BULLARD, JR.,

Petitioner-Appellant,

versus

HARRY K. SINGLETARY, JR.,
ROBERT A. BUTTERWORTH,
The Attorney General of the
State of Florida,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

Before HATCHETT, Chief Judge, TJOFLAT and BARKETT,
Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED.

Entered: September 25, 1998For the Court: Thomas K. Kahn, Clerk

By: Matt Davidson
Deputy Clerk

Issued as Mandate Jan 15 1999

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 97-3409
Non-Argument Calendar

D. C. Docket No. 94-808-Civ-J-20

ESTON BULLARD, JR.,

Petitioner-

Appellant,
versus

HARRY K. SINGLETARY, JR.,
ROBERT A. BUTTERWORTH, The
Attorney General of the State of Florida,

Respondent-

Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(September 25, 1998)

Before HATCHETT, Chief Judge, TJOFLAT and BARKETT, Circuit Judges. .

PER CURIAM:

In 1986, petitioner was convicted in Florida circuit court of robbery with a firearm. On August 22, 1994, having exhausted his state court remedies, petitioner filed a petition for writ of habeas corpus in the district court seeking the vacation of his conviction on five grounds: (1) ineffective assistance of counsel at petitioner's trial and at sentencing; (2) ineffective assistance of appellate counsel; (3) denial of due process of law at petitioner's resentencing proceeding because the trial court used illegal aggravations to sentence petitioner to life in prison without parole; (4) denial of due process of law because the trial court improperly instructed the jury on the elements of the offense of robbery, thus bringing about petitioner's conviction of that offense without proof beyond a reasonable doubt of every element of the crime; and (5) violation of the ex post facto clause when the trial court made an upward departure from the sentencing guidelines on the ground that a police of ficer was the victim of petitioner's offense.

After holding a day-long evidentiary hearing, the magistrate judge to whom the case was assigned, recommended in his report to the district court that the court deny the writ. The district court, after entertaining petitioner's objections to the magistrate judge's report and recommendation, adopted the report and recommendation in full, and, incorporating the same into its dispositive order, denied relief.

Petitioner now appeals. He contends that the district court
(1) erred failing "to undergo a § 2254 (d) analysis of the State court findings of fact," and in making "factual findings not supported by the record";
(2) erred in concluding that petitioner was not denied effective assistance of trial counsel - when counsel "(a) failed to object to an erroneous jury instruction . . . (b) failed to argue specific intent to rob and/or permanently deprive in the robbery case . . . and (c) failed to object to retroactive application of a sentencing guidelines

aggravation";
(3) erred in concluding that petitioner was not denied effective assistance of appellate a counsel "when appellant counsel failed to raise a meritorious severance issue on direct appeal";
(4) erred in concluding that the trial court did not deny petitioner due process of law in instructing the jury on robbery";
(5) erred in concluding that the trial court did not violate the ex post facto clause in resentencing petitioner; and
(6) erred in concluding that the trial court did not deny petitioner due process of law and his liberty interest in resentencing him.

We find no merit in any of these claims of district court error. The magistrate judge, in his report and recommendation to the district court, examined meticulously and with great care each of petitioner's claims, and found them wanting. The magistrate judge's findings of fact are well grounded in the record, and his conclusions of law are unassailable. The judgment of the district court is, accordingly,
AFFIRMED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

ESTON BULLARD, JR.,

Petitioner,

v. Case No. 94-808-C-J-20

HARRY K. SINGLETARY, JR., et al.,

Respondents.

ORDER

On June 5, 1997, the United States Magistrate Judge submitted a Report and Recommendation (Doc. No. 43). The Magistrate Judge recommended that the Petition for Writ of Habeas Corpus (Doc. No. 1) be denied. Petitioner filed objections to the findings and recommendation of the Magistrate Judge on July 25, 1997 (Doc. No. 46). Respondents filed a reply to Petitioner's objections on August 20, 1997. Doc. No. 48.

Petitioner's Motion to Strike Respondents' Reply to Objections (Doc. No. 49, filed September 2, 1997) is without merit and is therefore DENIED. Rule 72(b) of the Federal Rules of Civil Procedure explicitly authorizes the filing of a reply to a party's objections. There is no authority, however, as a matter of right which would allow Petitioner to file a response to Respondents' Reply. The existing, well-developed record will enable the Court to decide the matter. Accordingly, the Respondents' Reply will not be stricken, and in the Court's discretion Petitioner will not be granted leave to file an additional response.

Upon consideration of the Report and Recommendation, the objections made thereto, and the Reply to the objections, and upon conducting an independent de novo review of the entire record in this matter, including the transcript of the evidentiary hearing, the Court overrules the objections and adopts and confirms the Magistrate Judge's findings.

Accordingly, it is **ORDERED AND ADJUDGED** that the Magistrate Judge's Report and Recommendation is **ADOPTED**, and it is specifically incorporated into this order. Defendant's Petition for Habeas Corpus (Doc. No. 1) is **DENIED.**

The Clerk is directed to close the file.

DONE AND ORDERED at Jacksonville, Florida this 10th day of October, 1997.

HARVEY E. SCHLESINGER
HARVEY E. SCHLESINGER
United States District Judge

Copies to:
Hon. Timothy J. Corrigan, United States Magistrate Judge
John D. Middleton, Esq.
Assistant Attorney General (Menser)
Assistant State Attorney (Taylor)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

ESTON BULLARD, JR.,

Petitioner,

vs. Case No. 94-808-Civ-J-20

HARRY K. SINGLETARY, et al.,
Respondents.

REPORT AND RECOMMENDATION

I. Status

Petitioner Eston Bullard, Jr., who is an inmate of the Florida penal system, initiated this action by filing a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 on August 22, 1994. Petitioner is represented by counsel. He challenges his July 8,1986, state court (Duval County) conviction for robbery with a firearm on five grounds: (1) ineffective assistance of trial

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[1] Any party may file and serve objections hereto within TEN (10) DAYS after service of this opinion. Failure to do so shall bar the party from a *de novo* determination by a district judge of an issue covered herein and from contesting factual findings on appeal. See 28 U.S.C. § 636(b)(1); Fed.R.Civ.P. 72(b), 6(a) and (e); Local Rules 6.02(a) and 4.20(a), United States District Court for the Middle District of Florida.

counsel at the trial and resentencing; (2) ineffective assistance of appellate counsel; (3) denial of due process at resentencing when the Court used illegal aggravations to resentence Petitioner to life in prison without parole; (4) denial of due process when the trial court improperly instructed the jury on the elements of the offense of robbery under Florida law, which resulted in Petitioner's conviction without proof beyond a reasonable doubt for every element of the crime charged; and, (5) violation of the *ex post facto* proscription when on resentencing the trial court used the fact that a police officer was the victim for a departure basis.

Respondents filed a Response to Petition for Writ of Habeas Corpus (Doc. # 6) with an Appendix. Petitioner filed a Reply (Doc.# 11) and Notices of Supplemental Authority (Docs. # 13, 16). The Court granted Respondents' Motion to Amend Response (Doc. # 23).

The Court granted Petitioner's request for an evidentiary hearing on grounds 1 and 2. (Doc. # 17). Thus, the undersigned conducted a day-long evidentiary hearing on February 13, 1997, at which Petitioner called four witnesses. The parties have filed Proposed Findings of Fact and Conclusions of Law (Docs. # 40, 41).

II. State Court Procedural History

On July 15, 1985, Petitioner shot Tommy Etheridge in the presence of the victim's brother and other witnesses. Notice of Filing Transcripts Pursuant to Court Order (hereinafter Record), filed May 12, 1995, at 2, Arrest and Booking Report. Petitioner fled on foot and was stopped by Jacksonville Sheriff's Officer C.E. Williams. Id. Petitioner disarmed Officer Williams and fled to Nassau County in her patrol car (which he abandoned during the chase). Id. Petitioner was later captured. Id.

Petitioner was initially charged by Information with second degree murder and aggravated assault. Record at 4, Information.

Petitioner retained two lawyers. Record at 6, 8. Defense counsel began discovery immediately. Record at 7-8. On September 5, 1985, Petitioner was indicted for first degree murder and aggravated assault. Record at 13, Indictment. The State filed a "Notice of Similar Fact Evidence" on October 17, 1985, to notify the defendant of its intent to use evidence of Petitioner's October 14, 1973, attempted murder of Jerry Prevatt and his October 14, 1973, assault with a deadly weapon upon David Brumbaugh. Record at 20. On January 6, 1986, the defense filed a motion in limine to exclude the State's similar fact evidence. Record at 25.

On January 9, 1986, another Amended Indictment was returned, charging Petitioner with first degree murder and armed robbery. Record at 31, Indictment; Respondents' Appendix 1. The defense filed a "Notice of Insanity Defense," motions related to the death penalty, and a motion for severance of the murder and robbery charges. Record at 35-36, 39, 40; Respondents' Appendices 2 and 3.

Pretrial hearings were conducted on the defense motions. The trial court took the issues under advisement. Meanwhile, the defense secured the services of Dr. Harry Krop, a psychologist. Tr. at 119.

At the request of the defense, the trial court, on February 28, 1986, ordered a psychiatric evaluation of Petitioner to assess his competence (for trial) and his sanity. Record at 253-55, Order for Psychiatric Examination; Respondents' Appendix 4. Dr. Ernest C. Miller, M.D., and Patrick Kimball, L.C.S.W., were appointed to perform the evaluation. Id. On March 5, 1986, defense counsel filed an Amended Notice of Insanity Defense. Record at 256-57; Respondents' Appendix 5. On March 10, 1986, Dr. Miller wrote a letter to the state court trial judge, stating:

> With regard to the Court's specific questions, it is our opinion the patient at the present time merits adjudication of competence for trial purposes and does not meet the criteria

> for involuntary hospitalization. It is further our opinion that at the time of the alleged crime the patient was not insane, but was able to understand the nature, quality and wrongfulness of his acts.

Record at 368-71, 370, Letter, filed September 23, 1986; Respondents' Appendix 6.

The similar fact evidence was not admitted into evidence at the trial, and Petitioner did not allege insanity at the trial. The theory of the defense was set out in opening argument. Response, Appendix 9; Tr. at 616-23. The first degree murder charge was defended on a theory of self defense while the robbery charge was minimized as post-shooting confusion. Id. Petitioner did not testify at the trial.

The defense (the same lawyers Petitioner now alleges to have been ineffective) won an acquittal on the capital (first degree murder) charge, but Petitioner was convicted on the armed robbery charge. Record at 299-300, Verdicts. At sentencing, Petitioner received a life sentence. Tr. at 1099. This sentence was based on Petitioner's status as a habitual offender. Record at 339-42, 343-57; Respondents' Appendix 10.

Petitioner appealed to the First District Court of Appeal and was represented by the Public Defender's Office. On January 14, 1987, the Assistant Public Defender filed a motion requesting the state appellate court to relinquish jurisdiction to the lower court in an effort to have Petitioner resentenced in the state trial court to a reduced term. Respondents' Appendix 11. The First District Court of Appeal denied the request. Respondents' Appendix 12. Petitioner then filed an Initial Brief raising the following two issues:

> (1) the lower court erred in finding appellant to be a habitual offender and in using habitual offender status as the reason for departure from the recommended guidelines range of 12-17 years.
> (2) the court's instructions on the intent element of

robbery constituted fundamental error and a denial of due process denying the defendant a fair trial on the armed robbery charge.

Respondents' Appendix 13.

The State filed an Answer Brief, but this event was overshadowed in part by the Public Defender's motion to withdraw based upon criticism of its work by Petitioner. Respondents' Appendix 14. The case was remanded to the Circuit Court for resolution of the conflict. The state trial judge, after hearing testimony from Petitioner and the arguments of counsel, denied the motion to withdraw. Respondents' Appendix 15. The Assistant Public Defender then filed a reply brief.

The First District Court of Appeal upheld Petitioner's conviction, but reversed his sentence on the grounds raised by the Public Defender's Office. *Bullard v. State*, 515 So.2d 1028 (Fla. 1st DCA 1987) (The unpreserved jury instruction error was deemed harmless in light of the evidence at trial). Petitioner rehired his trial lawyer (Fallin), and the Public Defender's Office withdrew while a request for rehearing was argued.

The case returned to the trial court where Petitioner was again sentenced to life according to statute. He was not sentenced under the guidelines, but received a statutory sentence of life as a habitual offender. Respondents' Appendix 16.

The next significant phase in this case began with a series of collateral attacks on Petitioner's conviction and sentence in the trial court. The Petition itself sets forth the various actions and grounds raised. No evidentiary hearings were conducted in the state courts on the collateral proceedings, but merits rulings were entered on the issues raised in the Petition now before this Court.

III. Findings of Fact and Conclusions of Law

A. Antiterrorism and Effeceive Death Penalty Act of 1996

The Respondents initially urged this Court to apply the new habeas corpus standard of review set forth in the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter AEDPA), Pub.L. No.104-132, 110 Stat. 1214. See Respondents' Notice

Regarding Antiterrorism and Effective Death Penalty Act of 1996, filed February 13, 1997. They argued that the standard of review for the issues of ineffective assistance of trial counsel and appellate counsel has changed from *de novo* review to the limited review authorized by § 104(d) of the AEDPA. See Id. at 2.

Title I of the Act significantly curtails the scope of collateral review of convictions and sentences. Specifically, the amended version of 28 U.S.C. § 2254 provides, in pertinent part, that the writ of habeas corpus shall not be granted with respect to any claim adjudicated on the merits in a state court proceeding unless the adjudication of the claim

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

AEDPA, § 104(d). In sum, Respondents concluded the new standard of review precludes a *de novo* review and "compels the Petitioner to identify either a direct conflict with a decision of the United States Supreme Court or an unreasonable determination of the facts." Respondents' Notice at 3.

However, in their Proposed Findings of Fact and Conclusions of Law, Respondents recognize that retroactivity of the AEDPA is an unsettled issue which the Eleventh Circuit has not specifically decided. Petitioner, on the other hand, relies on *Huynh v. King*, 95 F.3d 1052, 1055 n.2 (11th Cir. 1996), stating the Eleventh Circuit has indicated it will not apply this section of AEDPA to habeas corpus petitions filed prior to the effective date of the Act. However, the Eleventh Circuit has corrected this opinion and now merely states: "We decline to apply this section retroactively in this case because neither party argues for such an application." *See Huynh*, 95 F.3d at 1055 n. 2 (corrected

opinion, November 27, 1996).

Because the Eleventh Circuit has not specifically decided this retroactivity issue, this Court declines to speculate on how it will resolve the issue, but notes that the Eleventh Circuit very recently applied the *de novo* standard, *Joiner v. U.S.*, 103 F.3d 961 (llth Cir. 1997), *petition for cert. filed*, (U.S. Apr. 21, 1997) (No. 96-8765), and therefore this Court will also apply that standard in this case.

B. Ineffective Assistance of Trial Counsel

Petitioner claims ineffective assistance of trial counsel for counsels' [2] (a) failure to pursue an insanity or voluntary intoxication defense to the armed robbery charge; (b) failure to argue to the jury or in his motion for judgment of acquittal that the defendant had not intended to "permanently" deprive the victim of the object of the robbery; (c) failure to object to an improper jury instruction on the elements the State needed to prove robbery in that the trial court instructed the jury that it could find the defendant guilty of robbery if he intended to permanently or temporarily deprive the victim of property; and, (d) failure to raise the constitutional ex post facto doctrine as an objection to the departure sentence imposed at the resentencing.

Petitioners' claim of ineffective assistance of counsel is governed by the two-part test announced in *Strickland v. Washington*, 466 U.S. 668, 687 (1984):

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed

---

[2] H.R. Fallin was lead counsel for Petitioner at the state trial, and Baya Harrison was "second chair." Transcript of the Evidentiary Hearing, held February 13, 1997, at 30-31.

> the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id., Joiner, 103 F.3d at 962; *Huynh v. King*, 95 F.3d at 1056. The performance prong of this standard was summarized in *White v. Singletary*, 972 F.2d 1218, 1220-21 (11th Cir. 1992), cert. denied, 115 S.Ct. 2008 (1995):

> Strickland held that in evaluating whether a trial counsel's performance was deficient, the counsels performance must be evaluated for "reasonableness under prevailing professional norms." Id. at 688, 104 S.Ct. at 2065. The test has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial. Courts also should at the start presume effectiveness and should always avoid second guessing with the benefit of hindsight. Id. at 689, 104 S.Ct. at 2065. Strickland encourages reviewing courts to allow lawyers broad discretion to represent their clients by pursuing their own strategy. We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately.

"Therefore, the cases in which habeas petitioners can properly

prevail on the ground of ineffective assistance of counsel are few and far between. "*Rogers v. Zant*, 13 F.3d 384, 386 (11th Cir. 1994).

To show prejudice, petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 n.s. at 694. "This 'reasonable probability'of a different result is simply a probability a sufficient to undermine confidence in the outcome of the case; a standard less than proof by a preponderance of the evidence." *Agan v. Singletary*, 12 F.3d 1012, 1018-19 (11th Cir. 1994) (quoting Strickland, 466 U.S. at 694). The proceeding must have been rendered unfair and the results unreliable. *Lockhart v. Fretwell*, 506 U.S. 364 (1993); *White v. Singletary*, 972 F.2d at 1220.

Ground 1(a)-
Failure to Pursue Insanity and Intoxication Defenses

Petitioner contends:

> Petitioner was charged with armed robbery, a specific intent crime for which under Florida law, insanity is a defense as well as voluntary intoxication. Prior to trial, at least one psychologist determined that Petitioner was not sane at the time the offense was committed. Further, there was more than ample evidence available that the defendant was extremely intoxicated during the time that the alleged crime was committed. Defense counsel failed to present evidence or argue evidence in the record or request the appropriate available jury instruction on either defense. The failure of counsel to pursue these defenses was extremely prejudicial to Petitioner since the basic facts of the case were not in dispute.

Petition at 13.

At the outset, this Court recognizes that H. Randolph Fallin and Baya Harrison are and were, at the time of Petitioner's state court trial, able and experienced criminal trial attorneys. Transcript of the February 13, 1997, Evidentiary Hearing (hereinafter EH Tr.), filed April 14, 1997. On January 28, 1986, Petitioner's defense counsel filed a Notice of Insanity Defense, in which they stated:

> [I]t has been determined that the Defendant herein has had severe mental laspes [sic] in regard to the events transpiring after the shooting of the victim, Tommy Ethridge, up to and including his capture by officers of the Nassau County and Duval County Sheriff's Offices. His actions after the shooting aforesaid are difficult to follow due to the apparent shock of being involved in the subject shooting, as well as having firearms pointed at Defendant.

Petitioner's Composite Exhibit, Exhibit 1, filed February 13, 1997; Record at 35-36.

On March 5, 1986, Petitioner's defense counsel filed an Amended Notice of Insanity Defense, in which they stated:

> [I]t has been determined that the Defendant herein has had severe mental laspes [sic] in regard to the events transpiring after the shooting of the victim, Tommy Ethridge, up to and including his capture by officers of the Nassau County and Duval County Sheriff's Offices. His actions and motivations for activities he engaged in after the shooting aforesaid make it impossible to adequately prepare legal defenses, due to his inability to relate fully what happened. The apparent shock of being involved in the shooting, as well as having several confrontations with the police involving firearms induced this "blackout."

Record at 256-57 (emphasis added to language added to the amended notice of insanity). Defense counsel stated they intended to call Dr. Harry Krop as a witness for the defense, id., but then at trial did not pursue the insanity defense.

At the evidentiary hearing, Mr. Fallin testified he met with Petitioner prior to the trial to discuss possible defenses, and Petitioner had a good recollection of the events of the homicide, but he blacked out during the robbery. EH Tr. at 39, 76. Mr. Fallin stated the insanity or voluntary intoxication defense was not pursued because their severance motion[3] was denied. Id. at 41; 83-84. He noted he could not develop an alcohol or a blackout defense without having Petitioner testify, and then Petitioner would have been questioned on the stand regarding other uncharged crimes he was involved in prior to the shooting. Id. at 43, 64-65, 79. He concluded if the murder and robbery charges had been severed, the defense could have pursued the voluntary intoxication or insanity defense concerning the robbery. Id.

While defense counsel explored and considered the voluntary intoxication and insanity defenses, they decided the most viable defense for the armed robbery was to argue it was grand theft, not robbery. Id. at 87-89. Thus, the defense for the taking of the police car was that the car was only a means to leave the area and that there was no intent to take it to deprive the police officer of her car. Defense counsel essentially minimized the charged crime of armed robbery and argued it as an auto theft.

Nothing has been shown to prove that counsels' decision not to raise the voluntary intoxication or insanity defense was beyond the range of reasonable professional judgment. Further, this Court notes that Petitioner now concedes "(d)efense counsel's explanation (at the evidentiary hearing) of why those defenses were not pursued, to wit: the trial judge denied

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[3] Petitioner has not raised a claim of ineffective assistance of trial counsel regarding the severance issue. It is clear from the record that defense counsel filed a written motion for severance in an effort to persuade the trial judge to sever the murder and armed robbery charges

Petitioner from having to Petitioner's Motion for Severance, was based on clear trial strategy designed to ke(ep) Petitioner from having to testify on his behalf." Petitioner's Proposed Report and Recommendation, filed April 21, 1997, at 14. Thus, defense counsels' performance in not pursuing the voluntary intoxication or insanity defense was not deficient and was based on rational trial strategy.

Even assuming arguendo counsels' performance was deficient, there was no prejudice. Mr. Fallin conceded that insanity and intoxication defenses are very difficult to sustain and that juries are hostile to these types of defenses. EH Tr. at 80. Further, in this case, the defenses were inconsistent with the deliberateness of Petitioner's actions. He had the presence of mind to take the police car at gunpoint and to drive to another county to a friend's house to flee the scene of the shooting. These acts are hardly consistent with a person so impaired as to be unable to form the intent required for committing the crime charged. Additionally, the charged crimes were not severed, and the defense for the murder was that it was an accidental or unintentional shooting, id. at 81, which the jury believed since he was acquitted of the murder charge. "Although inconsistent and alternative defenses may be raised, competent trial counsel know that reasonableness is absolutely mandatory if one hopes to achieve credibility with the jury." *Harich v. Dugger*, 844 F.2d 1464, 1470 (11th Cir. 1988)(en banc), *cert. denied*, 489 U.S. 1071 (1989) (suggesting to the jury that Harich was so drunk that he could not have intended the consequences of his acts would have totally undermined the position by Harich himself when he testified).

Ground 1(b)- Failure to Argue No Intent to "Permanently" Deprive

Petitioner claims defense counsel was ineffective for failure to argue to the jury or in his motion for judgment of acquittal that the defendant had not intended to "permanently" deprive the police officer of her patrol car. Specifically, Petitioner argues that Florida law defined "robbery," at the time, as an offense which

required proof of "intent to permanently deprive" as a key element of the crime. Petitioner contends that trial counsel failed to argue this point and thus rendered ineffective assistance.

The decision to defend the robbery charge without utilizing "intent to permanently deprive" was a proper strategic decision. The announced strategy of the defense was to defend the robbery charge on the theory that this case involved a "theft" rather than a "robbery." Mr. Fallin "never felt the robbery was a robbery." EH Tr. at 78. The defense of the robbery was centered upon the argument that Petitioner used the patrol car to get away and that it was not a robbery. Id. at 84. Concerning the strategy of the defense, Mr. Fallin testified, on cross-examination, as follows:

> Q. What was the defense that you put on as to the taking of the car?
>
> A. If my memory serves -- I haven't read the transcript in ten, 12 years -- but as I recall, that it was a means to leave the area and get away from that area, and that was it. (He) had no intent to take it or use it or sell it or hide it or keep it in any way permanently. It was a means to get from one place to another; it wasn't a robbery.
>
> Q. So you were asking the jury to find him guilty of grand theft on that count?
>
> A. That's right.
>
> Q. Your decision, when you decided to defend that particular count, was to minimize the crime itself, that is, the taking of the police officer's car, and tried to achieve a lesser-included offense?
>
> A. No, sir, no, sir, I didn't try to minimize it. I tried to have the jury convict him of what he did, which

was take a car, an auto theft, not a robbery.

Id. at 87-88.

Mr. Baya Harrison described the strategy of the robbery defense in greater detail since he was more involved in this defense than Mr. Fallin:

> Our strategy as far as that issue was concerned, the robbery issue, was not whether it was a temporary or a permanent taking. Our strategy was to contest whether or not there was a robbery at all.
>
> In other words, the facts were that Junior was just walking down the road. He was not armed. He wasn't running. He was just walking. He didn't want any trouble from this police officer. She stopped him. She was a very inexperienced law enforcement officer and she panicked. She at first tried to stop him while she was in the car. I mean it was very clumsy. She then gets out of her car, she pulls out this .38 special and sticks it in Junior's face. In fact, she said on deposition that she believed that Junior thought she was going to kill him, and she says in her testimony somewhere that she tried to pull the trigger and Junior got his finger in there between -- you know, so as -- so that the gun would not go off.
>
> My feeling was -- and I could be wrong, I could definitely be wrong -- that this was not a robbery. The fact of what was in Junior's mind when he took that car was not what was important. What we were trying to do was get a lesser included offense of conviction here of grand larceny.

Id. at 162.

The trial transcript, particularly the cross-examination of the victim (Officer Williams), supports Mr. Harrison's testimony that "intent to permanently deprive" was not the focus of the robbery defense, but rather the defense challenged the elements of "force" and "putting in fear." Mr. Harrison cross-examined Officer Williams at the trial. Officer Williams admitted that Petitioner was unarmed when she drew her gun on him and that he had put his hands in the air and declared he was unarmed. Tr. at 510-11.

> Q. Now I think you testified that at some point in time Mr. Bullard, once he got possession of the gun, he pointed it at you; is that correct?
>
> A. Yes.
>
> Q. All right. And you backed away just three or four feet; correct?
>
> A. Yes.
>
> Q. Now at that point in time he put the gun down; didn't he? Or he pointed the gun away from you; didn't he?
>
> A. I don't know. He turned around and got into the car and drove off.
>
> Q. You don't remember that?
>
> A. (No response).
>
> Q. Did Mr. Bullard ever say anything to you other than, "I don't have anything, I don't have anything"?

A. No.

Q. Okay. And no shots were fired; were they?

A. No.

Q. Mr. Bullard never said to you -- once ,
he had that pistol, he never said anything
like get your hands up, I'm going to take your
car; did he?

A. No.

Q. In fact, you were surprised when he
got in your car and drove off; weren't you?

A. Yes.

Q. All right. So the emotion, when His
Honor phrased the question earlier to ask
about your emotion, the emotion that you had
when he got in that car and took off was one
not of fear but of surprise; wasn't it?

A. After he got in the car and drove off
I was surprised.

Q. Ma'am, you were surprised when he hopped in
the car and took off; right?
A. Yes.

Q. Because -- because the incident with
him tussling with you with the gun was really
separate and apart from him hopping in the car and
taking off, now really, wasn't it?

Id. at 514-16. This line of questioning verifies Mr. Harrison's testimony at the evidentiary hearing that the strategy of the defense was to attack the "robbery" issue by challenging the "force or violence," prong (by separating the tussle over the gun from the taking of the car) and by showing that the victim was not placed in fear by or as a part of any taking of the car. As Mr. Fallin testified, the defense was that the facts showed an auto theft and not a robbery.

After the State rested, the defense gave its opening statement and never addressed the "robbery'" or "intent" issue, thus reflecting that the primary focus of the defense was on the murder/death penalty charge. Id. at 617-22. In closing argument, defense counsel concluded "(t)his is not an armed robbery, this may be auto theft, that's what it would be." Id. at 942.

> The elements of the robbery count will be explained to you and it will be – and it will be explained to you in great detail by the judge. But the part of it I think is the most important is that it requires the taking by force, violence or assault or putting the person in fear to take it. Not that the woman was afraid, but that was the reason she was in fear was Mr. Bullard was stealing her car. I submit that was an afterthought, she was afraid of him wrestling with her was not, though, to commit a robbery. That was an afterthought to get that car and drive off.
>
> And, again I emphasize you don't hear robbery victims surprised by them taking something of value as Ms. Williams was.

Id. at 952-53.

Petitioner was on trial for his life. The primary charge was capital murder. The charges of murder and robbery were not severed. Defense counsel did not want Petitioner to testify due to

the dangers of impeachment. EH Tr. at 64-65, 79, 187. And, no one else could testify to Petitioner's intent to "temporarily" rather than "permanently" take the car.

Mr. Harrison noted at the evidentiary hearing:

> Okay. Mr. Fallin's closing argument is exactly the theory that we -- and the strategy that we proceeded on regarding the issue that this was not a robbery case at all, that it was a grand larceny case. Now, you are saying we should have used -- made a big deal out of the temporary versus permanent deprivation of that vehicle. Respectfully, at the time, I beg to differ with you. I don't think that was the best strategy, I don't think -- I can't speak for Randy (Fallin), but I don't think he did either. That was what we understood the facts to be. It seemed truthful. To this day I believe it was true. This issue about whether it was temporary or permanent, to me, I don't think the jury would have bought that for a second.

Id. at 185-86 (emphasis added). Mr. Harrison thought that any argument regarding an intent to "temporarily versus permanently deprive" would have required placing Petitioner on the stand to testify and would probably have resulted in a conviction of first degree murder. Id. at 187.

Given the fact the defense used a strategy of attacking the robbery as an unplanned event and a spontaneous taking separate from the tussle over the gun (thus eliminating the elements of force, violence, and putting the victim in fear), rather than a defense based on Petitioner's intent to either "temporarily or permanently deprive, the ineffective assistance claim based on this issue is merely an unfounded attack upon counsels' trial strategy. Petitioner has not established deficient performance on the part of Mr. Harrison or Mr. Fallin[4].

Ground I(c)- Failure to Object to Erroneous Jury Instruction

Petitioner claims ineffective assistance of trial counsel for failure to object to an improper jury instruction on the elements of robbery. The trial court instructed the jury that it could find the defendant guilty of robbery if he intended to permanently or temporarily deprive the victim of property. At the preliminary jury instructions charge conference, the trial judge described the jury instruction to be used for robbery in violation of Florida Statutes § 812.13:

> Gentleman, this is the way the robbery will go. Before you can find the defendant guilty of robbery, the State must prove the following four elements beyond a reasonable doubt: number one, that the defendant took the motor vehicle from the person or custody of C.E. Williams; two, that the taking was by force, violence, assault, or by putting C.E. Williams in fear; three, the property taken was of some value; four, that the defendant took the property from C.E. Williams and at the time of the taking intended to permanently deprive C.E. Williams of the property, to-wit: the motor vehicle.

Petitioner's Composite Exhibit, Exhibit 20, Tr. at 604 (emphasis added). At this time, defense counsel was justified in believing the trial judge would give a jury instruction that included only the words "intended to permanently deprive."

However, at the jury instructions charge conference, the trial judge included the word "temporarily." Petitioner's Composite Exhibit, Exhibit 21, Tr. at 827. Finally, when the trial judge read the jury instruction on robbery to the jury, he again included the word "temporarily":

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[4] Because counsels' performance was not deficient, no discussion of prejudice is required.

> Before you can find the defendant guilty of robbery, the State must prove the following four elements beyond a reasonable doubt: number one, that the defendant took the motor vehicle from the person or custody of C.E. Williams; and two, that the taking was done by force, violence, assault, or by putting C.E. Williams in fear; and three, that the property taken was of some value; and four, that the defendant took the motor vehicle from the person or custody of C.E. Williams and at the time of the taking intended to temporarily or permanently deprive C.E. Williams of the motor vehicle.

Petitioner's Composite Exhibit, Exhibit 22, Tr. at 990; Petitioner's Composite Exhibit, Exhibit 13; Record at 283 (emphasis added).

Neither Mr. Fallin nor Mr. Harrison caught the inclusion of the word "temporarily" at the time it was read[5]. Both attorneys agreed that the jury instructions, which were quite lengthy, contained one single adverb ("temporarily") to which they, by hindsight, would have objected if they had noticed the inclusion of the word. Defense counsel later became aware of the inclusion of the word "temporarily" in the jury instruction and filed a Motion for New Trial addressed to this issue. Petitioner's Composite Exhibit, Exhibit 4, Motion for New Trial, filed March 24, 1986; Record at 303-04. The motion stated "(t)he Court erred in instructing the jury on the elements of armed robbery." Id. Additionally, they filed a Memorandum of Law in

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[5] At the evidentiary hearing, Petitioner testified he told Mr. Harrison, his defense counsel, that the trial judge had misstated the law regarding robbery by including the word "temporarily" in the jury instruction; however, Mr. Harrison did not object to the misstatement during the in-court proceedings. Transcript of the Evidentiary Hearing, held February 13, 1997, at 215.

Support of Defendant Bullard's Motion for New Trial and argued the issue to the trial judge. Petitioner's Composite Exhibit, Exhibit 5; Record at 305-15; Petitioner's Composite Exhibit, Exhibit 23; Tr. at 1033-45. After argument by counsel, the trial judge denied the Motion for New Trial, stating:

> All right. I deny the motion. I think the instruction was properly given. I think it's a complete statement of the or accurate statement of the law.

Tr. at 1046; Record at 316.

Defense counsel heard the correct standard jury instruction on robbery at the preliminary jury instructions charge conference, but missed the misstatement when the trial judge read the jury instruction on robbery to the jury. Pursuant to Fla.R.Crim.P. 3.390(d), defense counsel should have objected to the jury instruction. Petitioner's Composite Exhibit, Exhibit 14. (Further, at the evidentiary hearing, Petitioner argued that pursuant to Fla.R.Crim.P. 3.985 defense counsel should have requested the trial judge to enter a written order or explain on the record why he was deviating from the standard jury instruction. Petitioner's Composite Exhibit, Exhibit 15.This issue was never raised in the state courts and is procedurally barred. Moreover, the issue is not one of federal constitucional proportion.)

Mr. Fallin testified at the evidentiary hearing that he was ineffective for failing to object to the misstatement in the jury instruction. EH Tr. at 66. Further, Mr. Harrison testified he would have objected to the inclusion of the word "temporarily" if he had realized the trial judge had included it. Id. at 161-62, 164. Mr. Fallin also testified that the theory of the defense was that Petitioner used the police officer's car as a means to leave the area and that there was no "robbery" intent to take her police car. Id. at 84. It was not the defenses position that Petitioner merely intended to temporarily take the police car. Id. at 162. The theory of the defense was to "get a lesser-included offense of . . . grand larceny." Id. Thus, defense counsel were arguing that this was not a robbery at all, id., and the "temporary" versus

"permanent" distinction was not part of the defense theory. See Ground I(b), supra.

Strickland does not define deficient performance as every mistake made by counsel. In fact, *Strickland* holds that counsel is not expected to try a perfect case, and that not every error, even if professionally unreasonable, renders counsel ineffective. Neither is Mr. Fallin's confession of error entitled to controlling weight. *Harris v. Dugger*, 874 F.2d 756, 761 n.4 (11th Cir. 1989). In this case, the attorneys "missed", a single word ("temporarily") in a jury instruction. However, Mr. Harrison testified he would not have argued to the jury that Petitioner intended to take the police officer's car temporarily and not permanently. EH Tr. at 164. Moreover, defense counsel, in closing argument, summarized its theory of the case, which was not an argument that Petitioner intended to only temporarily take the police officer's car. Tr. at 941-42. Specifically, defense counsel stated:

> Certainly he took the car and he had no permission to, but he didn't rob her for the car.
>
> . . .
>
> Now this again is a good example as to what I think of the State's problem with their case of overcharging. Perhaps Mr. Bullard stole a police car, no question he didn't have permission to drive off in it, but this isn't an armed robbery. This is what we need to pay close attention to the elements and the opportunities you'll have to decide what if any criminal offenses were committed right there. This is not an armed robbery, this may be auto theft, that's what it would be.
>
> . . .
>
> The elements of the robbery count will be explained to you and it will be – and it will be explained to

> you in great detail by the Judge. But the part of it I think is the most important is that it requires the taking by force, violence or assault or putting the person in fear to take it. Not that the woman was afraid, but that was the reason she was in fear was Mr. Bullard was stealing her car. I submit that was an afterthought, she was afraid of him wrestling with her was not, though, to commit a robbery. That was an afterthought to get in that car and drive off.

Id. at 906, 941-42, 953 (emphasis added). At the evidentiary hearing, Mr. Harrison concluded the jury would not have accepted the "temporary taking" argument since the facts of the case did not present a joy ride situation. EH Tr. at 164, 171. Further, he stated because of the facts of the case concerning how Petitioner took the car from Officer Williams it would not have made a difference if the jury had been charged on the "temporary taking" issue. Id. at 186. Finally, he noted if defense counsel had argued that Petitioner intended only to temporarily take the car, Petitioner may have needed to testify. Id. at 187. He stressed how important it was to this case to avoid placing Petitioner on the stand. Id. Thus, defense counsels' performance in not objecting to the jury instruction was not deficient because the "temporary taking" of the car was not part of the defense trial strategy, which strategy was rational if not resourceful.

In any event, the jury instruction as given by the trial judge was later held by the Florida Supreme Court to be a correct statement of the law. In *Daniels v. State*, 587 So.2d 460 (Fla. 1991), the Florida Supreme Court held that the specific intent required to commit robbery is intent to steal, i.e., to deprive the owner of the property either permanently *or temporarily*. Thus, if this case were to be tried again, the word "temporarily" would be properly included in the jury instruction, just as it was at Petitioner's trial.

The prejudice prong focuses on the inquiry of whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair. *Strickland*, 466 U.S. at 687. "Unreliability or unfairness does not result if

the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him." *Lockhart v. Fretwell*, 506 U.S. at 371. Further, it is clear "(t)he assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision." Id. at 373 (quoting Strickland, 466 U.S. at 695) (Justice O'Connor, concurring opinion). The United States Supreme Court, in *Fretwell*, concluded that a court determining the prejudice prong of the two-part test "may not consider the effect of an objection it knows to be wholly meritless under current governing law even if the objection might have been considered meritorious at the time of its omission." Id. That is precisely the case here.

Because Petitioner has no constitutional right to be tried again under what is now an incorrect jury instruction, his ineffective assistance claim is without merit because he cannot show prejudice. Moreover, no prejudice has been shown because even if the trial judge had not included the (now correct) term "temporarily" in the jury instruction on robbery, it would not have changed the outcome of the jury trial.

Ground I(d)- Failure to Raise Ex Post Facto Issue on Resentencing

Petitioner contends counsel was ineffective for failure to raise the constitutional *ex post facto* doctrine as an objection to the departure sentence imposed at the resentencing. Specifically, Petitioner alleges the trial court imposed an allegedly illegal sentence at resentencing because the trial judge relied upon the victim's status as a police officer as a basis for departure. According to Petitioner, this factor was created in "1987" by the Florida Supreme Court's decision in *State v. Baker*, and thus applying it to his case constituted an *ex post facto* application. Thus, Petitioner concludes counsel erred by failing to object.

Even assuming arguendo that the *ex post facto* prohibition applies in this situation, this claim is meritless because Petitioner relies upon the wrong year (1987) in citing to *State v. Baker*, and incorrectly contends that the case was decided after Petitioner's

offense and conviction. See Petitioner's Proposed Report and Recommendation, filed April 21, 1997, at 20; Petitioner's Memorandum of Law in Support of Petition for Writ of Habeas Corpus, filed August 22, 1994, at 7. To the contrary, the decision was actually reported on February 6, 1986 (before Petitioner's trial), as *State v. Baker*, 483 So. 2d 423 (Fla. 1986), and it affirms a decision in *Baker v. State*, 466 So. 2d 1144 (Fla. 3rd DCA 1985) (decided March 26, 1985, before Petitioner's offense). Thus, the relevant decision was rendered before Petitioner's crime and was affirmed by the Florida Supreme Court before Petitioner's sentencing; application of *Baker's* teachings to Petitioner's case did not create any *ex post facto* problems. For this reason, Petitioner's ineffective assistance of trial counsel claim on this ground is without merit.

C. Ineffective Assistance of Appellate Counsel

As ground 2, Petitioner claims his appellate counsel[6] was ineffective for failing to raise on direct appeal (a) the trial court's denial of Petitioner's Motion to Sever the first degree murder and armed robbery charges, and (b) the trial court's denial of the motion for a judgment of acquittal based on the insufficiency of the evidence on the robbery charge.

In *Heath v. Jones*, 941 F.2d 1126, 1130 (11th Cir. 1991) (citations omitted), cert. denied, 502 U.S. 1077 (1992), the Eleventh Circuit recognized: "(t)his circuit has applied the Supreme Court's test for ineffective assistance at trial, see *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), to guide its analysis of ineffective assistance of appellate counsel claims. Therefore, (Petitioner) must show that his appellate counsel's performance was deficient and that this performance prejudiced the defense. "See page 11, supra.

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[6] P. Douglas Brinkmeyer, an Assistant Public Defender, was Petitioner's appellate counsel. Transcript of Evidentiary Hearing, held February 13, 1997, at 106.

In applying the Strickland components,

> [a] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies . . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.

Smith v. Wainwright, 777 F.2d 609, 616 (11th Cir. 1985) (quoting Strickland, 466 U.S. at 697), *reh'g denied*, 785 F.2d 1037 (11th Cir.), cert. denied, 477 U.S. 905 (1986).

Thus, in reviewing appellate counsel's performance, the inquiry is whether it was a reasonable decision under prevailing professional norms to not raise the issue on direct appeal. The Court should presume effectiveness. *Strickland*, 466 U.S. at 690. The reasonableness of counsel's assistance is reviewed in light of the facts and law that existed at the time of the challenged conduct. *Chateloin v. Singletary*, 89 F.3d 749, 753 (11th Cir. 1996). Finally, the "Sixth Amendment does not require appellate advocates to raise every non-frivolous issue." Heath, 941 F.2d at 1130-31.

> [E]ffective advocates "winnow out" weaker arguments even though the weaker arguments may be meritorious. . . . [A]n appellate advocate who review[s] the entire record, th[inks] about various claims, and then cho[oses] to pursue [some] claims on appeal ha[s] furnished effective appellate assistance. . . . [E]ven though a non-appealed issue might have been successful, the appellate advocacy ha[s] to be judged in its entirety.

13. at 1131.

To determine prejudice, this Court must review the merits of the omitted claim. If "the omitted claim would have had a

reasonable probability of success on appeal, then counsel's performance necessarily resulted in prejudice." *Joiner v. U.S.*, 103 F.3d 961.

Ground 2(a)- Failure to Raise Denial of Severance on Appeal

Petitioner contends his appellate counsel was ineffective for failing to raise on direct appeal the trial court's denial of Petitioner's Motion to Sever the first degree murder and armed robbery charges. Prior to the trial, defense counsel filed a Motion for Separate Trials and Severance of Offenses and a Memorandum of Law and Fact in Support of His Motion to Sever Counts One and Two and for Separate Trials Thereon. Petitioner's Composite Exhibit, Exhibits 2 and 3; Record at 40, 181-87. Defense counsel addressed the Motion to Sever with the trial judge on February 21, 1986, but argument on the motion was continued. Petitioner's Composite Exhibit, Exhibit 16; Record, Volume III, Tr. at 20-24.

On February 25, 1986, counsel presented the Motion to Sever to the trial judge. Petitioner's Composite Exhibit, Exhibit 17; Record, Volume IV, Tr. at 49-68. In support of the motion, defense counsel submitted a memorandum of law and the deposition of Officer Charnita Williams, the police officer who was robbed. Record, Volume IV, Tr. at 50. Initially, the trial judge read the facts from defense counsel's memorandum of law in support of the Motion to Sever and asked if counsel could agree on a statement of facts. Id.

The trial judge summarized the issue:

> And, what I'd like to know (is) if you gentlemen can agree on a statement of facts, can we agree on this? In this memorandum by Defense Counsel that Bullard allegedly shot Tommy Ethridge at about 2:30 a.m. on March 15th, 1985(,) at the home of Bucky Peeples on Aline Road in North Jacksonville.
>
> Then left those premises. Approximately two hours later Bullard was arrested by Jacksonville police

Officer Charnita Williams as he was walking westbound down the road. Bullard was unarmed. Ms. Williams pulled out her .38 revolver and told Bullard to get his hands up. She pointed her gun at Bullard.

The point the defendant emphasizes here is that Ethridge and Williams incidents are separate and distinct.

Mr. Bullard was casually walking down the street when arrested by Officer Williams. He just wanted to be left alone. The officer admits aiming her revolver at him so that he thought she was going to shoot him on the spot. She also acknowledges that Bullard grabbed her gun in order that she not shoot him.

Bullard then hopped in her squad car and to get away from her.

Under *Puhl v. State*, it says that --cites that 1983, Fourth DCA is squarely on point, that around 8:00 p.m. Puhl kidnapped a woman and took her to the convenience store where she escaped. Then between two and a half hours later he robbed three other people, used the same gun in the robberies that he used in the kidnapping incident.

The appellant could find -- the appellate court found kidnapping and robberies were not based on the same transaction, or two or more connected acts or transactions and therefore that the trial court had erred in not granting the defendant('s) pretrial motion for severance of the counts.

The Court is in exactly the same situation as the Puhl case because the robbery of the police officer's

> car took place about two hours after the alleged homicide and had nothing in common with that alleged homicide.
>
> Four, there's another very important aspect in the Puhl case in which the evidence of the defendant's guilt in the kidnapping and subsequent robbery was overwhelming as to each individual count. The Court held nevertheless the harmless error rule was inapplicable since where there is a disjoinder of counts that rule does not apply.

Can we agree on those facts generally as to time, place and so on?

Id. at 50, 52-53.

The State informed the trial judge that the time and dates were incorrect, noting the shooting took place on July 15, 1985, at 3:30 a.m., not March 15, 1985, at 2:30 a.m. Id. at 53-54. Further, the State noted the robbery/attempted arrest by Officer Williams occurred at 4:05 a.m. Id. at 54. The State repeatedly contended the robbery occurred thirty-five minutes or "some 40 minutes" after the shooting. Id. at 54, 55, 66. Further, the State argued the shooting and the robbery were within "walking distance" and were within a "couple of miles" of each other. Id. at 54. Finally, the State concluded "(t)he evidence of the armed robbery would be admissible in the murder case because Bullard's flight from a police officer when the police officer attempted to make an arrest would be admissible to show his escape to avoid prosecution or his flight to avoid prosecution." Id. at 55. The State cited two cases[7], id. at 56, 59, in support of its argument, but the trial judge concluded neither case was similar to the issue before the court. Id. at 59, 64.

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[7] *King v. State*, 390 So.2d 315 (Fla. '980); *Bundy v. State*, 455 So.2d 330 (Fla. 1984).

Defense counsel stated the robbery was about two hours after the shooting. Id. at 53[8], 62, 66. Further, defense counsel argued *Puhl v. State*, 426 So.2d 1226 (Fla. 4th DCA 1983) was controlling and the shooting and robbery incidents were "not the same episode" since they were two hours and "quite some distance" apart. Tr. at 62-63.

Even after the State noted it would like to provide case law with regard to the flight to avoid prosecution issue, the trial judge stated he was ready to make a ruling. Id. at 65. The State responded "(w)hatever the Court's preference." Id.

> Okay. I grant the motion for severance. I don't think that there's any relationship at all between the robbery and the murder. I think the distance, the time, and the space between one and the other have nothing to do except that the defendant was leaving that general area and I think it would be error to try them together.

Id. at 65-66.

The State again informed the trial judge that counsel had not agreed on the facts (the time between the shooting and the robbery; the mileage/distance between where the shooting occurred and where the robbery took place), that counsel had not submitted anything regarding the mileage between where the shooting and the robbery occurred, and that defense counsel had only cited the *Puhl* case in support of their motion. Id. at 66-68. The trial judge asked the State if it needed more time, and the State responded affirmatively. Id. Thus, the trial judge

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[8]The trial judge quoted defense counsel's contentions contained in his Memorandum of Law and Fact in Support of His Motion to Sever Counts One and Two and for Separate Trials Thereon. Petitioner's Composite Exhibit, Exhibit 3; Record at 183.

took the Motion for Separate Trials and Severance of Offenses under advisement until February 28, 1986. Id. On February 28, 1986, the trial judge denied the Motion for Separate Trials and Severance of Offenses without a written opinion or any further discussion. Record, Volume II at 248-49.

Petitioner was represented on direct appeal by P. Douglas Brinkmeyer, an Assistant Public Defender. EH Tr. at 106. Mr. Brinkmeyer has practiced criminal law since 1975 and did two years of trial work and three years of appellate practice with the Public Defender's Office of the Tenth Circuit before moving to Tallahassee in 1981. Id. Since 1981, he has done criminal appellate work in the Appellate Division of the Public Defender's Office for the Second Circuit. Id. Mr. Brinkmeyer testified that the severance issue was not preserved for appellate review:

> My understanding was at that time and still is that any pretrial motion must be made in writing prior to trial, and the trial lawyer has an obligation to present it to the court in a timely fashion and to get any ruling on it before trial because trial judges do not like motions coming in on the day of trial which could have been made pretrial. And if the motion is denied pretrial, then the lawyer has an obligation to renew the motion at the beginning of the trial.

Id. at 118, 120-21. However, both Mr. Fallin and Mr. Harrison testified they had properly preserved the severance issue for appeal. Id. at 54, 56-57.

As Petitioner's appellate counsel, Mr. Brinkmeyer's responsibility was to insure that the state court record was complete and "to review the record and look for possible points on appeal." Id. at 122. Mr. Brinkmeyer described his duty as an "obligation to raise any arguable meritorious issues . . . ." Id. at 122-23. He noted that some issues are arguable, but not meritorious since the First District Court of Appeal "is a very

conservative appellate court."[9] Id. at 123. He concluded his "policy is that (he) will present only those issues that (he) can honestly sign (his) name to the brief that (he) believe(s) have merit." Id. at 137.

Mr. Brinkmeyer and Petitioner did not agree on the issues to be raised on appeal, and Petitioner wrote more than one letter to Mr. Brinkmeyer and his office demanding that additional matters be raised on appeal. Id. at 123-26. Prior to Mr. Brinkmeyer's filing of the appellate brief, Petitioner asked him to raise the severance issue on direct appeal. Id. at 126. Mr. Brinkmeyer never responded in writing to any of Petitioner's letters. Id. at 132. However, Mr. Brinkmeyer did talk with Mr. Fallin regarding the appeal, and Mr. Fallin urged him to raise the habitual offender sentencing and the jury instruction issues. Id. at 128.

Thus, while Mr. Brinkmeyer was aware of the severance issue, he concentrated on the habitual offender sentencing and the jury instruction issues pursuant to Mr. Fallin's instructions. Id. at 126-29. Mr. Brinkmeyer had "no independent recollection" of why he did not raise the severance issue, but had "some ideas about why (he) didn't raise that issue." Id. at 127, 129. In reviewing the record, he knew he had two other meritorious issues on which he could likely prevail. Id. at 127-29. Indeed, appellate counsel did ultimately prevail on the sentencing issue on appeal. Bullard, 515 So.2d 1028.

Petitioner claims Mr. Brinkmeyer did not raise the severance issue because he believed it was not preserved for appeal, and Mr. Brinkmeyer's testimony reflects this. This Court does not

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[9] The First District Court of Appeal, in 1992, denied without opinion Petitioner's Petition for Writ of Habeas Corpus on the severance issue. Petitioner's Petition at 10-11; Transcript of the Evidentiary Hearing, held February 13, 1997, at 138-39.

need to address whether a written severance motion, denied pretrial, needs to be renewed at trial to properly preserve the issue for appellate purposes. This is because, putting aside the issue of whether Mr. Brinkmeyer's performance was deficient in failing to raise this issue, no prejudice has been shown as the severance issue would not have had a reasonable probability of success on appeal.

The standard of review in Florida appellate courts on a trial court's denial of a motion for severance is and was in 1986 a showing that the trial court abused its discretion. *Panzavecchia v. Wainwright*, 658 F.2d 337 (5th Cir. 1981); *Crossley v. State*, 596 So. 2d 447 (Fla. 1992); *Menendez v. State*, 368 So.2d 1278 (Fla. 1979). The mere fact that the appellate court "might have decided the motion differently if it had been the trial court" will not warrant reversal. *Canakaris v. Canakaris*, 382 So.2d 1197 (Fla. 1980) (Judicial discretion is abused when judicial action is arbitrary, fanciful, or unreasonable, or where no reasonable man would take the view adopted by trial court; however, if reasonable men could differ as to the propriety of action taken by trial court, then it cannot be said that trial court abused its discretion.).

While the trial court in this case was initially receptive to severance, Tr. at 65-66, the court eventually exercised its discretion and denied the severance motion. Record, Volume II at 248-49. While the record does not show why the trial judge changed his mind, the record does show the denial of the severance motion was within the trial court's discretion. Tr. at 52-53. The principal case cited by defendant in support of severance, *Puhl v. State*, 426 So.2d 1226 (Fla. 4th DCA 1983), is clearly distinguishable from the case now before this Court. In *Puhl*, before trial, Puhl moved for a severance of four charges involving the kidnapping victim from the eight charges involving five other victims, but the trial court denied the motion. The evidence at trial showed that Puhl held a gun on a woman and kidnapped her on September 6 at 8:00 p.m. About two and one-half hours later on the same night, he robbed three other persons, fired shots at them and at two other persons. The

Fourth District Court of Appeal stated, "(t)he only similarity between the offense against the kidnapping victim and the other victims was the use of a handgun by Puhl. "*Puhl*, 426 So.2d at 1226. It concluded "offenses may not be joined if they are not based on the same act or transaction or two or more connected acts or transactions and that a severance must be granted upon a timely motion if two or more offenses are improperly joined. Id. at 1226-27.

Here, unlike *Puhl*, Petitioner's two charges (first degree murder and robbery) were episodically connected[10] since Petitioner was fleeing the homicide scene when Officer Williams came upon him. Apparently, the trial judge agreed with the State that Petitioner was in flight from the homicide when he took the police officer's car. In closing argument, the State reminded the jury of the flight or fleeing the scene by Petitioner, Tr. at 893, and the trial court did give a flight jury instruction. Td. at 982-83. The record supports the trial court's decision to deny severance since the trial court was within its discretion to determine that the robbery of Officer Williams and the taking of her car were clearly part of Petitioner's flight from the scene of the homicide and were within close proximity timewise and logistically.

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10 In *Wright v. State*, 586 So.2d 1024, 1029 (Fla. 1991), the Florida Supreme Court reiterated that joinder of criminal charges is not proper for charges based on similar but separate episodes, separated in time, which are connected only by similar circumstances and the accused's alleged guilt in both or all instances. The charges must be "episodically connected," not distinct. Id.

Petitioner's contention that the charges were not connected is unconvincing[11]. Petitioner himself has argued that the robbery and the homicide occurred "close" in time, Petitioner's Memorandum at Petitioner further contended at trial that he blacked out during the robbery due to the stress of the homicide, so he implicitly concedes the connection between the events while sacrificing the ability to allege that the taking of the police car was not a part of his flight from the homicide.

Thus, Petitioner cannot show the trial court abused its discretion in denying severance, a prerequisite to reversal on appeal. Therefore, Petitioner has failed to show a reasonable probability that Petitioner would have prevailed on this issue on appeal, and the ineffective assistance claim based on appellate counsel's failure to raise the severance issue is without merit.

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11 None of the cases cited by Petitioner in support of his contention are factually similar to this case. See Petitioner's Proposed Report and Recommendation, filed April 21, 1997, at 23 n.1. The closest case, Jones v. State, 497 So.2d 1268 (Fla. 3rd DCA 1986), review denied, 506 So.2d 1043 (Fla.), cert. denied, 484 U.S. 823 (1987), reversed a denial of a motion to sever but on factually distinguishable grounds. Moreover, Jones has been called into question by the Florida Supreme Court in Crossley v. State, 596 So.2d 447, 450 (Fla. 1992). This Court has independently reviewed additional Florida case law on severance and is satisfied that the trial judge did not abuse his discretion in denying severance on these facts and that therefore Petitioner was not prejudiced by appellate counsel's failure to raise the issue on direct appeal. See Gudinas v. State, No. 86070, 1997 WL 166238 (Fla. Apr. 10, 1997) (affirming denial of severance (joinder)); see also Brown v. State, 502 So.2d 979 (Fla. 1st DCA 1987).

Ground 2(b)- Failure to Raise Denial of Motion for Judgment of Acquittal on Appeal

Petitioner claims ineffective assistance of appellate counsel for his failure to raise on direct appeal the trial court's denial of the motion for a judgment of acquittal based on the insufficiency of the evidence on the robbery charge. Defense counsel, at the close of the State's case, argued the motion for judgment of acquittal:

> As to Count II (robbery), Your Honor, I'd like you to really take a hard look at this and ask you if you would agree with me that while there may have been an unlawful taking of this police officer's vehicle, this is not a robbery. She testified that the defendant approached her, he was frightened, he put up his hands, he said, "I don't have anything. I don't have anything," and then he acted in taking away her gun only to protect herself pardon me, protect himself from being shot by this police officer.
>
> And the important thing about that is there is a real kind of a splinter dichotomy between the incident with the wrestling with the gun and the taking of the car. In other words, the taking of the car was kind of an afterthought.
>
> What I am saying is I don't think Mr. Bullard ever put this lady -- let me rephrase it, he never took this vehicle by putting this officer in fear by assaulting her or by doing anything else that's set forth in the robbery statute. There's just not that nexus between the taking of the car and the wrestling of the gun.
>
> If you remember that she said that Mr. Bullard put his finger -- thumb in the hammer portion of the gun in order to prevent her from shooting him. It

was kind of a defensive thing.

And I just think the nexus for robbery just isn't there and I would ask that you grant a judgment of acquittal as to Count II.

Tr. at 613-14. The trial court denied the motion for judgment of acquittal, stating the State had shown a prima facie case: :

On the charge of robbery, I deny the motion for judgment of acquittal on that for the reason I feel as though the State's made out a prima facie case, they've proven time, date, place, identity. They've had testimony of the victim in this case that that [sic] defendant did use force, violence, assault upon her in taking her gun, and that she said she was in fear at the time he took it she was in fear and she was also surprised. Those are also not necessarily mutual exclusive emotions, one does not exclude the other that he took the car, but the reason he took the car is because she was in fear. She couldn't stop him, that's what her testimony was. He had a gun he wrestled from her.

And the fact he may feel as though there were -- was a dichotomy of events, I don't agree with you whether there was or not. She was still placed in fear and he took the motor vehicle from her. And in my opinion it's not the ordinary standard robbery where you hold up, give me your money or your life, nonetheless it meets all the elements of a robbery. And I don't know that the -- in any event, I feel as though the State's made out a prima facie case sufficient to go to the jury on the charge of armed robbery.

Id. at 614-15. Further, when the moti-on was renewed, the trial court denied the motion, stating there was prima facie evidence sufficient to submit the case to the jury. Id. at 879.

Petitioner has not shown his appellate counsel's performance was deficient. Petitioner, at the evidentiary hearing, did not inquire as to why Mr. Brinkmeyer did not raise this issue on appeal. Further, Petitioner did not address this issue in his Proposed Report and Recommendation. See Petitioner's Proposed Report and Recommendation at 24-25. This Court is of the opinion that appellate counsel's failure to raise the denial of the motion for judgment of acquittal was not deficient because the trial court did not err in denying the motion. Further, Mr. Brinkmeyer spoke with Mr. Fallin and raised on direct appeal the two arguable and meritorious issues suggested by Mr. Fallin. Thus, this Court is not convinced that Mr. Brinkmeyer was deficient in not raising this issue on appeal.

Robbery is defined as the taking of money or other property which may be the subject of larceny from the person or custody of another when in the course of the taking there is the use of force, violence, assault, or putting in fear. Fla. Stat. § 812.13(1) (1989). The trial judge read the following instructions to the jury:

> Before you can find the defendant guilty of robbery, the State must prove the following four elements beyond a reasonable doubt: number one, that the defendant took the motor vehicle from the person or custody of C.E. Williams; and two, that the taking was done by force, violence, assault, or by putting C.E. Williams in fear; and three, that the property taken was of some value; and four, that the defendant took the motor vehicle from the person or custody of C.E. Williams and at the time of the taking intended to temporarily or permanently deprive C.E. Williams of the motor vehicle.

Tr. at 990.

Under Florida law, "(i)n moving for a judgment of acquittal, (Petitioner) admits not only the facts stated and the evidence adduced, but he also admits, for the purpose of the motion, every conclusion favorable to the State that a fact-finder might reasonably infer from the evidence." *Lynch v. State*, 293 So. 2d 44, 45 (Fla. 1974). The testimony of Officer Williams describes the taking of the car by Petitioner. From that testimony, the trial court was correct in denying the motion for judgment of acquittal, concluding that the jury could reasonably find that Petitioner had committed a robbery.

On appeal, when faced with an issue of whether the trial court erred by denying a motion for judgment of acquittal, the appellate court reviews the evidence to determine if the evidence is sufficient to create a jury question. See *Smithson v. State*, 689 So. 2d 1226, 1228 (Fla. 5th DCA 1997). This Court believes that there was sufficient evidence on the robbery count to submit the question to the jury, and this issue would not have had a reasonable probability of success on appeal.

D. Remaining Claims

In ground 3, Petitioner claims the state courts misapplied state sentencing guidelines. This Court agrees with Respondents' contention that this ground does not present a violation of federal constitutional dimension. It is clear that federal habeas corpus cannot be used to ask federal courts to reapply state sentencing law and substitute their own sentences for those of the state courts. In ground 4, Petitioner contends he was denied a fair trial because of the use of an improper jury instruction on robbery due to the inclusion of the word "temporarily." For the reasons stated in Section B of this Report and Recommendation and because the improper jury instruction (later found to be proper) did not so infect the entire trial that the resulting conviction violated due process, see *Estelle v. McGuire*, 502 U.S. 62 (1991), this claim is without merit. Finally, as ground 5, Petitioner claims an *ex post facto* violation at resentencing. For

the reasons stated in Section B of this Report and Recommendation, this claim is without merit.

IV. Recommendation

That the Petition for Writ of Habeas Corpus (Doc. # 1) filed herein be DENIED.

ENTERED at Jacksonville, Florida, this 5th day of June, 1997.

UNITED STATES MAGISTRATE JUDGE

sc 6/4
c: The Honorable Harvey E. Schlesinger,
United States District Judge
John D. Middleton, Esquire
Assistant Attorney General (Menser)
Assistant State Attorney (Taylor)

Eston BULLARD, Jr.,
Appellant,
v.
STATE of Florida, Appellee.
No. B0-61.
District Court of Appeal of Florida,
First District.
Oct. 28, 1987.
Rehearing Denied
Dec. 8, 1987.

Defendant was convicted by jury in the Circuit Court, Duval County, R. Hudson Olliff, J., of armed robbery and was sentenced to life imprisonment with three-year mandatory minimum, and he appealed. The District Court of Appeal, Booth, J., held that: (1) defendant's habitual offender status could not be used as reason for departure from guidelines recommendation of 12 to 17 years, and (2) instruction on intent element of robbery, that State had to prove defendant's intent to temporarily or permanently deprive robbery victim of property, was not fundamental error in absence of issue with respect to that element.

Affirmed in part, reversed in part, and remanded.

1. Criminal Law - 1203.32

Armed robbery defendant's habitual offender status could not be used as reason for departure from sentencing guidelines recommendation.

2. Criminal Law -1038.1(4)

Instruction on intent element of robbery, that State had to prove defendant's intent to temporarily or permanently deprive robbery victim of property, was not fundamental error in absence of issue with respect to that element.

Michael E. Allen, Public Defender, and P. Douglas Brinkmeyer, Asst. Public Defender, Tallahassee, for appellant.

Robert A. Butterworth,

1. Although *State v. Neil*, 457 So.2d 481, 487 (Fla. 1984) expressly left open the question, we assume, without deciding, that the decision is applicable to other than racial groups. Of course, we have already decided that the holing in *Neil* applies to civil cases. See City of *Miami v. Cornett*, 463 so.2d. 399 (Fla. 3d DCA 1985).

Atty. Gen., and John M. Koenig, Jr., Asst. Atty. Gen., Tallahassee, for appellee.

BOOTH, Judge.

This cause is before us on appeal from a judgment of conviction entered on a jury verdict of guilty of armed robbery and sentence to life imprisonment with a three-year mandatory minimum. On appeal, the issues are: first, whether the trial court erred in using appellant's habitual offender status as the reason for departure from the sentencing guidelines recommendation of 12 to 17 years; and second, whether the court's instruction on the intent element of robbery constituted fundamental error. We affirm appellant's conviction, but are required to reverse his sentence and remand for resentencing due to the decision of the Supreme Court of Florida in *Whitehead v. State,* 498 So.2d 863 (Fla.1987).

The facts are that Jacksonville Police Officer Charnita Williams observed appellant walking along a road as she responded to a radio call that there had been a murder in the area. As the officer pulled her car over appellant walked towards the car with something in his hand. The officer drew her gun and got out of the car as appellant rushed to the rear of the car. After raising his hands, appellant grabbed the officer's wrist and took the gun, pointing it at her. As the officer backed away, appellant got into the marked patrol car and drove away.

Later that day, Nassau County Deputy Sheriff W.G. Dover identified the stolen patrol car exceeding the speed limit and followed it onto a road where he found the car abandoned. Appellant was apprehended after being tracked by a police dog.

[1] The trial court exceeded the guide-lines recommendation due to appellant's qualification as a habitual offender. This was error under the holding in *Whitehead supra,* wherein the Supreme Court held that habitual offender status is not an adequate reason to depart from the sentencing guidelines. In *Brown v. State,* 508 So.2d 776 (Fla. 1st DCA

1987), this court further ruled that conviction of a first-degree felony coupled with a habitual offender status does not require a mandatory sentence of life imprisonment under Section 775.-084(4)(a)(1), Florida Statutes. Therefore, we must reverse appellant's sentence and remand for resentencing.

[2] As to the second issue, the trial court charged the jury that the state had to prove appellant's intent to "temporarily"or "permanently" deprive the robbery victim of property. The standard jury instructions do not include the word "temporarily," and robbery requires the specific intent to permanently deprive. *Bell v. State*, 394 So.2d 979 (Fla.1981). In *Hall v. State*, 505 So.2d 657 (Fla. 2d DCA 1987), the court found reversible error in a similar instruction where the objection was preserved for appeal. In the case below, there was no timely objection. Therefore, the question is whether the erroneous instruction was fundamental error. *See Castor v. State*, 365 So.2d 701 (Fla.1978).

In *Williams v. State*, 400 So.2d 542 (Fla. 3d DCA 1981), the Third District Court of Appeal held that the omission, without objection, of the intent element from a robbery instruction was harmless and not fundamental error. *Williams* states the error must involve a critical and disputed issue at trial, holding (400 So.2d at 544-545):

... While there are several broad references to an affirmative duty of the trial court to instruct the jury on the elements of the crime charged [citations omitted], the fact is that every such omission or misstatement which has actually been found to constitute fundamental error concerned a critical and disputed jury issue in the case....

...[W]hen it does not appear that the subject of the defective charge was an issue at the trial, our courts have repeatedly declined to reverse in the absence of timely objection....

....

.... [S]everal courts presented with the identical issue involved here have squarely held, as we do, that the

omission of the intent element from a robbery instruction is not fundamental error in the absence of a real dispute on that question. *Williams, supra,* states the generally recognized rule that the omission of, or erroneous instruction with respect to, a particular element of an offense is not reversible and/or fundamental error if there was no issue with respect to such element. *See* Annot., 169 A.L.R. 315 (1947). In *Leary v. State,* 406 So.2d 1222 (Fla. 4th DCA 1981), the court affirmed the robbery conviction, holding:

> We agree that failing to charge on the element of intent is prejudicial error. *Bell v. State,* 394 So.2d 979 (Fla.1981) We do not agree, however, that it is necessarily error of fundamental proportions. Where, as here, the evidence is clear and undisputed that property [automobile] is taken from another by the use of force and transported to another locality, the undeniable inference is that there was an intention to deprive the owner of that property. *There was neither evidence nor argument raising specific intent as an issue in this case.* Under such circumstances failure to instruct on intent does not amount to a deprivation of due process. (emphasis added)

The record does not indicate that appellant disputed the intent element at trial below. There was evidence that appellant did not abandon the stolen car until hours after it was stolen and only then when a deputy sheriff in another county began following him. Appellant was obviously not out for a joyride. There was neither evidence nor argument raising specific intent as an issue, and the instruction, therefore, was not error of a fundamental nature. The evidence below, in the context of the issues presented by both sides, leaves no doubt that appellant possessed the requisite state of mind.

AFFIRMED in part, REVERSED in part, and REMANDED for resentencing.

WENTWORTH, J., and WILLIS, BEN C., (Ret.), Associate Judge, concur.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

June 28, 1999

AREA CODE 202
479-3011

John David Middleton
303 State Road 26
Melrose, FL 32666

RE: Eston Bullard, Jr. v. Harry K. Singletary, Jr., Sec., Florida Department of Corrections (U. S. Court of Appeals for the Eleventh Circuit No. 94-3409)

Dear Mr. Middleton:

Your petition for a writ of certiorari in the above-entitled case was received from Federal Express on June 21, 1999 and must be returned as out-of-time.

The time to file this petition began to run on December 31, 1998, when the United States Court of Appeals for the Eleventh Circuit denied your petition for rehearing. Accordingly, the petition had to be filed in this court on or before March 31, 1999, which was 90 days from the date of denial of the petition for rehearing . See Rule 13 of the Rules of this Court and 28 U.S.C. 2101(c). Your initial petition was not received until April 15, 1999.

Once the time to file a petition in a civil matter has expired, the Clerk is directed by Rule 13.2 to refuse to file the petition.

Your check in the amount of $300 is returned as well.

Sincerely,
William K. Suter, Clerk
By: Francis J. Lorson
Francis J. Lorson
(202) 479-3024

Enclosures

cc: Clerk, U.S. Ct. of Appls., 11th Circuit
Richard Doran

AFFIDAVIT

STATE OF FLORIDA
COUNTY OF PUTNAM

JOHN D. MIDDLETON, ESQ., being by me first duly sworn, deposes and says as follows:

1. I am an attorney licensed to practice law in the State Florida and have been since 1976.

2. On August 24, 1994, I filed a Petition for Writ of Habeas Corpus on behalf of Eston Bullard, Jr. in the Federal District Court, in and for the Middle District of Florida. The District Court denied the Petition and I filed a timely appeal to the Eleventh Circuit Court of Appeals.

3. The Eleventh Circuit Court of Appeals issued it *per curiam* opinion September 25, 1998 affirming the lower court's order.

4. I next filed a timely Motion for Rehearing the Eleventh Circuit Court of Appeals which was denied by its Order filed December 31, 1998. The Eleventh Circuit issued its Mandate on January 15, 1999.

5. Petitioner filed a Petition for Writ of Certiorari in the United States Supreme Court on April 15, 1999. The Clerk of the United States Supreme Court refused the accept the petition for filing because it was filed more than 90 days after the December 31, 1998 order denying rehearing was entered by this Court.

6. My office miscalendered the date that the Petition for Writ of Certiorari should have been filed. As a result I rendered ineffective assistance of counsel to Mr. Bullard as he had no input or control as far as the filing date. As a result Mr. Bullard is being denied the opportunity to

file a Petition for Certiorari in the United States Supreme Court and to have these issues heard.

7. The issues in the Petition for Certiorari are not frivolous and have substantial arguable merit.

JOHN D. MIDDLETON, ESQ.

SWORN TO AND SUBSCRIBED before me this 12th day of April, 2000, by JOHN D. MIDDLETON, ESQ. who is personally known to me.

Notary Public

Commission Number:
My Commission Expires: